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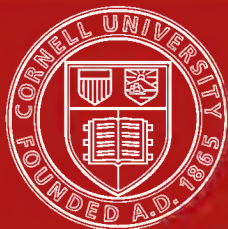
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THE ALSOP CLAIM

The Case of  
The United States of America

FOR AND IN BEHALF OF THE  
ORIGINAL AMERICAN CLAIMANTS IN THIS CASE  
THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES

*VERSUS*

The Republic of Chile

BEFORE

HIS MAJESTY GEORGE V

OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, AND OF THE  
BRITISH DOMINIONS BEYOND THE SEAS, KING, AND EMPEROR OF INDIA

Under the Protocol of December 1, 1909



WASHINGTON  
GOVERNMENT PRINTING OFFICE

1910



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## THE CASE OF THE UNITED STATES.

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On December 1, 1909, the Governments of the United States and Chile agreed, subject to the pleasure of His Late Majesty, Edward VII, upon the following Protocol of Submission of the so-called Alsop claim, which has been the subject of diplomatic correspondence between the two Governments for many years.

### PROTOCOL OF SUBMISSION.

"The Government of the United States of America and the Government of the Republic of Chile, through their respective Plenipotentiaries, to-wit:

"Seth Low Pierrepont, Chargé d'Affaires of the United States of America, and Augustin Edwards, Minister of Foreign Affairs of Chile, who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following

### PROTOCOL OF SUBMISSION.

"Whereas the Government of the United States of America and the Government of the Republic of Chile have not been able to agree as to the amount equitably due the claimants in the Alsop claim;

"Therefore, the two Governments have resolved to submit the whole controversy to His Britannic Majesty Edward VII who as an 'amiable compositeur' shall determine what amount, if any, is, under all the facts and circumstances of the case, and taking into consideration all documents, evidence, correspondence, allegations, and arguments which may be presented by either Government, equitably due said claimants.

"The full case of each Government shall be submitted to His Britannic Majesty, and to the other Government through its duly accredited representative at St. James, within six months from the date of this agreement; each Government shall then have four months in which to submit a counter case to His Britannic Majesty, and to the other Government as above provided, which counter case shall contain only matters in defense of the other's case.

"The case shall then be closed unless His Britannic Majesty shall call for further documents, evidence, correspondence, or arguments from either Government, in which case such further documents,

evidence, correspondence, or arguments shall be furnished within sixty days from the date of the call. If not so furnished within the time specified, a decision in the case shall be given as if such documents, evidence, correspondence, or arguments did not exist.

"The decision by His Britannic Majesty shall be accepted as final and binding upon the two Governments.

"In witness whereof, the undersigned Plenipotentiaries of the United States and Chile have signed the above Protocol both in the English and Spanish languages, and hereunto affixed their seals.

"Done in duplicate, at the City of Santiago, this 1st day of December, 1909.

"(L. S.)

"(L. S.)

SETH LOW PIERREPONT.

AUGUSTIN EDWARDS."<sup>a</sup>

This Protocol having been brought to His Late Majesty's attention and the Governments of the United States and Chile having through their accredited representatives near His Majesty's Government, formally requested that His Majesty would consent to undertake the function of passing upon the controversy between the two Governments, His Majesty was pleased to receive the request favorably and graciously indicated a willingness to act as *amiable compositeur* under the Protocol.

Upon the untimely and lamented death of His Majesty Edward VII, and upon the accession of His Majesty George V to the Throne, the Governments of the United States and Chile, through their duly accredited representatives near His Britannic Majesty's Government, consulted the pleasure of His Majesty George V regarding His Majesty's willingness to undertake under the protocol the same high function of passing upon the merits of this controversy; whereupon His Majesty was in turn pleased to receive the request favorably and also graciously to indicate a willingness to act as *amiable compositeur* under the Protocol above set forth.

The Government of the United States therefore submits, in accordance with the terms of the Protocol, for His Britannic Majesty's consideration and determination, the Case of the United States.

---

<sup>a</sup>I Appendix, p. 1.



# THE UNITED STATES OF AMERICA,

FOR AND IN BEHALF OF THE ORIGINAL, AMERICAN CLAIMANTS IN THIS CASE,  
THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES,

*versus*

# THE REPUBLIC OF CHILE.

---

## INTRODUCTORY STATEMENT.

### *Historical Résumé.*

The Government of the United States alleges, contends, and maintains that the Government of Chile is liable to the Government of the United States, acting for and in behalf of Mr. John Wheelwright, Mr. George Frederick Hoppin, Mr. Henry W. Alsop, Mr. Joseph W. Alsop, Mr. Edward McCall, Mr. George G. Hobson, Mr. George J. Foster, Mr. Theodore W. Riley, Mr. Henry Chauncey, and Mr. Henry S. Prevost, American citizens (their heirs, assigns, representatives, and devisees), formerly doing business in Chile and the United States under the firm name of Alsop & Company, in the sum of \$2,803,370.36 American gold, with such other additional unliquidated sums as are hereinafter mentioned.<sup>a</sup>

This obligation arises directly from and is connected with a contract, bearing date of December 26, 1876, executed in pursuance of and embodying in its terms two supreme decrees duly made and enacted by the Government of Bolivia on the 23rd and 24th days of December, 1876, the said contract being made by and between Mr. John Wheelwright, described therein as a native of the United States of North America, merchant, resident of Valparaíso, Republic of Chile, as liquidator of Alsop & Co., and Doctor Manuel Ignacio Salvatierra, Minister of Finance and Industry, as representative of the Government of Bolivia, which contract was subsequently duly approved by an Act of the Bolivian Congress passed on or about February 12, 1878.

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<sup>a</sup> For articles of copartnership, see II Appendix, pp. 46, 53; for citizenship of claimants, see II Appendix, pp. 154-164.

These decrees thus made and enacted are in words and figures as follows:<sup>a</sup>

[Translation.]

*“Resolution of December 24, 1876.*

“MINISTRY OF FINANCE AND INDUSTRY,

*“La Paz, December 24, 1876.*

“In view of a proposition made by Mr. John Wheelwright, a member and representative of the firm of Alsop & Co., of Valparaíso, in liquidation, for the purpose of providing for the consolidation and payment of its claims against the Government by an assignment of the rights which were acknowledged in favor of Pedro Lopez Gama, a new compromise has been concluded in a cabinet meeting with Mr. Wheelwright which finally terminates this matter. It is drawn up in the following terms:

“First. The sum of 835,000 bolivianos is acknowledged as due the aforesaid representative of the firm of Alsop & Co., together with interest at the rate of 5 per cent per annum, not addable to the principal, and to be reckoned from the date on which this contract is duly executed.

“Second. The said principal and interest shall be amortized by means of drafts, all of which are to be drawn in quarterly installments on the surplus which, from the date on which the present customs contract with Peru terminates, shall arise, from the quota due Bolivia in the collection of duties in the Northern custom house, over and above the 405,000 bolivianos which the Peruvian Government now pays,—whether the customs treaty with that Republic is renewed or whether the National Custom House is re-established.

“Third. All of the silver mines of the government in the department along the coast are hereby devoted to the payment of the said amortization for which purpose 40 per cent of the net profit shall be utilized, except in the mine known as ‘Flor del Desierto,’ concerning which provision is made in the ensuing article.

“Fourth. The aforesaid mine called ‘Flor del Desierto,’ together with one other of the government mines to be selected by the party concerned, are hereby devoted to the payment of the interest claimed as due, amounting to 170,700 bolivianos prior to December 18, 1875, and 70,000 bolivianos for the year now expiring. In the mine called ‘Flor del Desierto’ the quota due the Government and applicable to the payment of this amortization shall be 50 per cent of the net proceeds, and in the other mine it shall be 40 per cent, as in the remaining mines granted. The surplus remaining after the payment of this interest shall be applicable to the amortization of the capital acknowledged as due, as provided in clause 3, it being a condition that if one or both of the concessions produce nothing or little, then this obligation and every claim to said interest due shall be finally canceled.

<sup>a</sup> The formal contract between Wheelwright and the Bolivian Government (which was dated Dec. 26, 1876) took the form of a notarial document in which these decrees were offered by Doctor Manuel Ignacio Salvatierra and formally accepted by Wheelwright. p. 50 *infra*.

"Fifth. The operation of the mines of the Government let as concessions in the foregoing articles shall be subject to the contract concluded this date on the subject, the interested party being permitted to assign these rights and this compromise to such persons or companies as he may deem suitable, giving notice thereof to the Government.

"Sixth. In all cases in which sums of money are paid or received, the Chilean peso or the Peruvian sol of stamped silver shall be considered equivalent to the boliviano, either in this contract or in that regarding the mining concessions.

"Let the proper document be executed, inserting therein this compromise and the contract connected therewith which is mentioned above. Let this be recorded.

"[SEAL.]

" DAZA.

" OBLITAS.

" CARPIO.

" VILLEGAS.

" SALVATIERRA." <sup>a</sup>

[Translation.]

"*Resolution of December 23, 1876.*

"MINISTRY OF FINANCE AND INDUSTRY,

"*La Paz, December 23, 1876.*

"In accordance with the compromise made this day it has been agreed by the Government in Cabinet Council with Mr. John Wheelwright, representative of the firm of Alsop and Company, that the operation of the Government mines which have been let out as a concession to said firm on the same date shall be subject to the following clauses and conditions:

"1. Mr. John Wheelwright shall have a period of three years within which to examine the Government silver mines and find the necessary capital with which to put them into operation, it being his duty to take the necessary preliminary measures to this end as soon as possible. The mines shall remain at the disposal of the concessionary during these three years, and the Government shall enable it to gain actual possession thereof by giving the proper instructions to the authorities.

"2. By virtue of the concession which has been made to him the concessionary shall be entitled to organize joint stock companies for the operation of one or more claims, either on the coast or abroad; or else to conclude contracts with the owners of adjacent mines in order to secure the most certain means of operating all or any of the said concessions which in the opinion of the concessionary or companies organized are profitable or will at least pay the cost of working them where veins are already discovered or may be discovered during the three years assigned in the first clause.

"3. The concessionaries may hire and employ in their mining work either foreign or native engineers, employees, or laborers, who

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<sup>a</sup> I Appendix, p. 8.

shall, during the period for which they are hired, be exempt from all military service as well as every civil or municipal office, except in cases of necessity in order to preserve public order and peace.

"4. The concessionary or companies in charge of the work shall present semiannual balances, on the strength of which, together with the records of the books, the distribution shall be made of the net proceeds, forty per cent being applied by the Government to the paying off of the debt according to the terms agreed upon in the compromise of this date, and sixty per cent going to the petitioner.

"5. The Government shall appoint one or more agents to superintend the work performed, who shall be compensated out of the common funds of the enterprise.

"6. This contract shall last for 25 years, after which time, if there is any residue after paying off the Government's debt in accordance with the compromise, it shall be turned over to the Government.

"7. If, within the first three years or thereafter until the expiration of the 25 years mentioned in the foregoing article, any persons or companies should offer to operate one or more of the mines included in this contract, they may do so provided the present concessionary does not care to undertake the operation thereof and so states in writing to the Government, or else deliberately neglects to make such statement.

"8. The Supreme Government shall grant to the petitioner free of charge, during the continuance of this contract, such lands of the Government as may be necessary for the erection of his buildings and mining establishments. Let this be recorded.

"[L. S.]

" DAZA.

" OBLITAS.

" CARPIO.

" VILLEGAS.

" SALVATIERRA." <sup>a</sup>

It will be noted that these decrees deal with and provide for three distinct matters and obligations:—

(1) The decrees recognize as due to the concessionaries (Alsop & Co., represented by John Wheelwright) from the Government of Bolivia a principal sum of 835,000 bolivianos (worth at that time about \$805,775 American gold, the value of the boliviano being about 96.5 cents). This sum was to bear interest at the rate of 5 per cent per annum from the date of the contract until paid. For the payment of this debt the Government of Bolivia specifically set apart and appropriated all the Arica customs receipts which might be collected in excess of a definite amount named and provided.

(2) The decrees recognize as due to the concessionaries a sum designated as accrued interest amounting to 240,700 bolivianos (American gold \$232,275.50). For the payment of this sum the

Government of Bolivia set aside its proportion of the net proceeds of two mines (one named in the decree and the other to be chosen later) which were to be worked by the liquidator.

(3) The decrees also provide for and include in their terms a twenty-five year lease (running to the aforesaid concessionaries), of the Government estacas of public instruction (*Estacas de Instruccion Publica*) located in the Bolivian Littoral, known as the Coast Department. The contract provided that forty per cent of the net proceeds coming from the working of the mines (which was the share that, under the contract, was to be allowed to the Government of Bolivia) should also be applied to the liquidation of the principal indebtedness.

The legality and equity of this contract has never been questioned by the Governments of either Bolivia or of Chile, and indeed the duly accredited representative of the Government of Chile to the Government of the United States has recently stated in express terms that the Government of Chile has no evidence going to show that the full amount called for under the contract is not legally and equitably due.<sup>a</sup>

It is the contention of the Government of the United States that the Government of Chile is obligated to pay to the Government of the United States for and in behalf of the claimants, the principal sum as well as the interest called for by the contract, and also to answer in damages for a tort committed in connection with the concessionary grant which was created and conveyed by the contract.

The Government of the United States contends and maintains that this liability resting upon the Government of Chile to discharge the debt of the principal sum and the interest thereon accruing arises from three sources:

(1) It arises because the Government of Chile knowingly and with intent seized and appropriated to its own uses the proceeds of the Arica Custom House which were already set aside and appropriated by the aforesaid contract to the payment of this debt.

(2) It arises because the Government of Chile has repeatedly promised the Government of Bolivia that it would fully discharge this obligation, the Government of the United States having the rights of a beneficiary under such promises.

(3) It arises because the Government of Chile, through its proper representative, has formally and repeatedly promised the

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<sup>a</sup> See p. 41, *infra*.

Government of the United States that it would fully meet this obligation.

Moreover, the Government of the United States further contends and maintains that the liability of the Government of Chile to answer to the Government of the United States for damages in tort arises from the fact that the Government of Chile, after taking possession of the Bolivian Littoral, applied to the private and vested concessionary rights, titles, and interests therein, belonging to the concessionaries, the provisions of the Chilean laws, notwithstanding such Chilean law so applied, materially and to the great damage of the concessionaries, derogated from and destroyed certain clear, vested, and well established rights, titles, and interests owned and possessed by the concessionaries under Bolivian law at the time the Government of Chile took possession.

As above summarized the contract of 1876 provided three sources from which the debt recognized by it as due was to be paid:

(1) The Government of Bolivia specifically set aside and appropriated to the payment of the 835,000 bolivianos with the interest accruing thereon all the customs receipts in excess of 405,000 bolivianos per year which the Government of Bolivia should receive from the Northern Custom House (located at Arica), whether the customs agreement between Bolivia and Peru regarding the distribution of customs was renewed, or whether the Bolivian National Custom House should be re-established.

(2) The Government Estaca mines (Estacas de Instruccion) granted to the concessionaries by the contract were to be operated under an agreement set forth in the contract by which sixty per cent of the net proceeds of the operation were to go to the concessionaries and forty per cent of said net proceeds to the Bolivian Government, with the proviso that the forty per cent belonging to the Bolivian Government under this arrangement should be applied by that Government to the payment of the principal indebtedness until the same was entirely met and satisfied, after which the said forty per cent, for the balance of the lease period then remaining, should be paid to the Bolivian Government.

(3) The accrued interest, recognized as due by this contract, was to be satisfied from the proceeds of two mines, according to the following plan: Of the mine called "Flor del Desierto," fifty per cent of the net proceeds was to be applied to the payment of the interest then accrued, the other fifty per cent of the net proceeds to go to the concessionaries; of the second mine to be chosen later

(the mine actually selected being the "Disputa") forty per cent of the net proceeds was to be applied to the payment of the accrued interest, the other sixty per cent of the net proceeds of the mine to belong to the concessionaries,—it being further provided that in case there was at the end of the twenty-five years a surplus remaining from the above fifty and forty per cent belonging to the Government of Bolivia and so to be applied to the payment of the interest, such surplus should be turned over to the Government of Bolivia. It was also provided that if one or both of these mines should produce nothing or little, then the obligation as to the accrued interest should be considered as finally canceled.

This contract has been repeatedly recognized and approved by all branches of the Bolivian Government, beginning as early as January 5, 1877, in an executive decree putting the contract into effect, and coming down as recently as March 7, 1908, upon which latter date, in a letter addressed to the American Minister resident at La Paz, the Bolivian Minister of Foreign Relations reiterated what had been set forth in former communications as to the binding nature of the obligations assumed by Chile. In one communication, dated September 10, 1907, the Bolivian Government, through its Minister of Foreign Relations, made to the American Minister at La Paz the following statement as to the contract:

"In the present case, Your Excellency may remember that at the payment of the credit recognized to Messrs. Alsop & Co., various mines in the littoral of Bolivia were concerned, thereby constituting a true pledge, which still subsists not only in accordance with the principles of universal civil law, but also because of the fact that in the Treaty of Peace Chile expressly recognizes this credit which falls on the said littoral, and which has become part of its territory."<sup>a</sup>

Indeed, this approval and recognition have taken the form of decrees by the Bolivian Executive for the execution of the contract, the formal and specific approval by the Bolivian Congress, and the incorporation in numerous treaties between Chile and Bolivia of stipulations for the entire and complete satisfaction of the indebtedness.

Immediately upon the execution of the contract John Wheelwright took the initial steps looking to the operation of the mines of the Littoral leased to him by the terms of the agreement. On

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<sup>a</sup> I Appendix, p. 39.

December 27, 1876, he published in the newspapers of La Paz and Caracoles the following notice:

“MINING SETTS OF THE STATE ON THE COAST.

“I hereby give notice to all who have adjoining properties, or who are in any way interested in the above mentioned mines, that in virtue of a Supreme Decree of the 23rd inst., *I am in possession of all the Mining Setts of Silver belonging to the State in the Coast Department*, and consequently that any arrangement which such persons may desire to enter into respecting same should be made with the undersigned, with whom they can communicate by addressing him at Valparaiso, post office box No. 254.

“JOHN WHEELWRIGHT.”<sup>a</sup>

On the 5th of January, following, Dr. Manuel I. Salvatierra, Minister of Finance, of Bolivia, addressed to the Prefect of the Department of Cobija a communication stating that

“*The Government, by the contracts of the 23d and 24th December last, which are registered in No. 61 of the ‘Reforma,’ has adjudicated to Mr. Wheelwright, the representative of Messrs. Alsop & Co., of Valparaiso, in liquidation, all the Mining Setts, Estacas Mines of Silver belonging to the State, situated in the Coast Department.*

“In order that this adjudication may be duly carried into effect, you will please render Mr. Wheelwright all the aid dependent on your authority, and you will arrange: That the Sub Prefects and other functionaries under your jurisdiction may, within their sphere, render Mr. Wheelwright such aid that he may be put in peaceful possession of the said Mining Setts.

“Due compliance with this disposition is expected from your patriotism.”<sup>a</sup>

Supplementary instructions to the various officials concerned were sent by the Bolivian Executive, acting through the appropriate officers, under dates of May 24, 1878, March 28, 1878, July 25, 1878, August 9, 1878, August 21, 1878, October 30, 1878, December 12, 1878, and February 5, 1879.

However, before Mr. Wheelwright had completed his examination of the various government estacas in the Littoral or made his final determination as to those which he would choose to work under his contract, and while there yet remained more than ten months of the three years within which it was necessary to make these determinations, the Government of Chile, without previous announcement and without any declaration of war, threw her troops into the Bolivian Littoral and occupied the port of Antofagasta. By the 16th of February, 1879, the Chilean forces had occupied the region of the rich silver mines at Caracoles

<sup>a</sup> II Appendix, p. 143.



and by the end of March the entire Littoral was under their control. The Chilean officials at once imposed upon the occupied territory the provisions of the Chilean law.

This law injuriously affected the concessionary interests of the concessionaries in several most important particulars. In the first place, it required them, contrary to the provisions of the Bolivian law, to expend annually a large sum upon each and every government estaca which they thought they might desire to work in the future and over which therefore they desired to retain control, under penalty that failing this expenditure the mines should be open to denouncement and exploitation by any person desiring to undertake the same. This was contrary to the provisions of the Bolivian law which recognized the concessionaries as standing in the place of the Bolivian Government and bearing the same relation to the estacas as that Government, and therefore as entitled to hold the mines without the necessity of expending this annual sum, or assessment. In the second place, the Chilean law as interpreted by the Chilean Executive and the Chilean courts required that the concessionaries should have actual physical possession of the government mining setts which they desired to work and that as to those setts of which they had not such physical possession they stood in no different or better position than any other person, and that any other person who had taken possession of such setts was entitled thereto in preference to the concessionaries. This also was plainly contrary to the provisions of the Bolivian law, as expressed in the contract itself, and in the various Executive Decrees and the laws promulgated and passed for the enforcement of the concessionaries' rights. In the third place, notwithstanding the contract specifically gave to the concessionaries the right to work the government mining setts in and through the properties and mines of adjoining owners, the laws of Chile were so interpreted as to deprive them of the benefit of this plain and specific provision of their contract. Lastly, the provisions of the Chilean law applied by the Government of Chile to holdings of the concessionaries in the Littoral prevented them from extending their operations beyond the prism of earth which would be formed by perpendicular planes passing through the side and end lines of the claim, whereas the laws of Bolivia would have permitted them to follow the veins beyond the planes passing through the side lines.

Under date of March 3rd, 1879, the Government of Chile, in order to reassure the various powers whose citizens and subjects

possessed property or were engaged in business in the territory overrun and occupied by the Chilean forces, issued to the Legations of those various powers at Santiago a circular letter, in which the Minister of Foreign Relations, after pointing out that Chile had assumed jurisdiction over the desert of Atacama as a matter of "revindication" and that it had been forced to warlike methods against its well-known policy of moderation and forbearance and only after it had exhausted all resources within its power and had imperiled the dignity of the nation, concluded by saying:

"I need not assure your Honor that your countrymen will find every description of guaranty for their persons and interests in the territory in which Chilian law has now resumed its sway." <sup>a</sup>

Relying upon this formal declaration by the Government of Chile, the Government of the United States, notwithstanding numbers of its citizens found themselves deprived of their rights and property by the Chilean officials, refrained from making any urgent representations in their behalf, secure in the belief that, pursuant to the high purpose it had announced in the circular note just quoted, the Government of Chile would voluntarily, upon the cessation of hostilities, restore such citizens to the rights and property of which they had been deprived. But, as time passed, it developed that the Government of Chile not only gave no evidence of an intention to put American citizens in possession of property which had been taken from them, but that, on the contrary, there appeared to be on the part of the officials of the time a disposition to endeavor to justify by executive act and judicial decree the destruction of American interests and property, and this notwithstanding the solemn and formal guaranty given by the Minister of Foreign Relations of Chile as set forth above.

Conditions being thus, Mr. Wheelwright at once undertook to secure an interpretation of his contract and his rights thereunder by the Chilean courts, and for this purpose he brought two suits, one regarding the mine *Justicia* and the other regarding the mine *Amonita*, both of which were government estacas. With reference to the mine *Justicia*, the lower court rendered a decision on May 14, 1881,<sup>b</sup> sustaining the contentions of Mr. Wheelwright, but this was reversed by the court of second instance on December 19, 1882, in a decree which held in effect that unless Mr. Wheelwright had actual physical possession of the government estaca he had not perfected his right thereto under his contract. In the second suit, concerning the mine *Amonita*, the court

<sup>a</sup> I Appendix, p. 263.

<sup>b</sup> II Appendix, p. 99.

appears to have held, in a decision rendered on May 2, 1882,<sup>a</sup> that the government estacas were denounceable. Inasmuch as the principles announced by the Chilean courts in these cases curtailed and lessened in a material way the rights enjoyed by Mr. Wheelwright under the Bolivian law, under which his rights accrued, and inasmuch therefore as these decisions were in violation of that perfectly established rule of international law which requires that the rights of private property shall be respected by a conquering or overrunning power, the Government of the United States contends that the Government of Chile is liable to respond in damages for such infractions of the law of nations.

Under date of September 11, 1882, John Stewart Jackson, as attorney for John Wheelwright, who had thus failed in his efforts to secure his rights before the Chilean courts, presented a petition to the Chilean Government in which he set forth the various matters of complaint indicated above; called particular attention to the fact that under the decrees of the tribunals the estacas must be constantly worked in order that they might not be denounced, which was contrary to the Bolivian law, and also to the fact that if the Chilean law were to apply the owner of the estaca would be strictly confined within his side and end lines, while under the Bolivian law he might follow the lode; and concluded with the prayer that the Government give him relief in the matter, inasmuch as the decision of the court resulted in depriving him of his property.<sup>b</sup> On October 18, 1882, the Minister of Justice, replying to this petition of Mr. Wheelwright, presented by his attorney, Mr. Jackson, issued a decree in which, after stating among the "Considerations," that "*the first of the objects to which this petition is directed points towards a diplomatic claim, which, although not absolutely formulated, is at least insinuated, and that claims of this class do not fall under the action of the Minister of Justice,*" referred the petitioner to the "Tribunals of Justice to appreciate or qualify the merit of the private rights which a private individual pretends to have against the State." <sup>c</sup>

On November 21, 1883, Jackson again petitioned the Chilean Government requesting that in the contemplated treaty between Bolivia and Chile (negotiations for which were then pending) some provision might be made for the payment of Bolivia's debt under the Wheelwright contract,<sup>d</sup> and this request was renewed

<sup>a</sup> II Appendix, p. 120.

<sup>b</sup> II Appendix, p. 135.

<sup>c</sup> II Appendix, p. 150.

<sup>d</sup> II Appendix, p. 262.

in a petition answered March 21, 1884.<sup>a</sup> A similar request was made upon the officials of the Government of Bolivia, as appears from the correspondence passing between Mr. Wheelwright and Señor Belisario Salinas, one of the negotiators on the part of Bolivia of the Pact of Truce and its complemental protocol. This correspondence consisted of a letter, dated November 23, 1883, from Mr. Wheelwright to Mr. Salinas in which he introduced Mr. John Stewart Jackson and requested that the Wheelwright contract should not be overlooked in the negotiations between the two Governments; and an acknowledging letter, dated December 11, 1883, from Mr. Salinas to Mr. Wheelwright, in which Mr. Salinas referred to the representations made by Mr. Jackson in regard to Mr. Wheelwright's claim, the letter concluding with the following statement:

"I have the satisfaction to say that, when the proper moment has arrived to treat of those subjects in the course of negotiations with the Chilean Government, I shall bear in mind your indications in order to arrive at the solution desired by you."<sup>b</sup>

But in spite of this the Pact of Truce, which was negotiated under date of April 4, 1884, contained no specific provision for the payment or recognition of this obligation.

Although he had previously brought his grievances to the attention of the American Minister in Santiago during the summer of 1883, at which time the American Minister reported the fact to the Department in a despatch dated August 9, 1883,<sup>c</sup> Mr. Wheelwright on June 28, 1884, now thoroughly impressed with the belief that he must appeal for the intercession of his own Government before he could hope to secure redress, presented to the American Minister at La Paz, then residing temporarily at Lima, a memorial in which he made formal claim against Chile on behalf of the American citizens constituting the firm of Alsop & Co. to the end that the rights of such citizens might be protected. This document was in due course forwarded to the Department of State at Washington.<sup>d</sup>

Early in 1884, the Minister of the United States at Santiago took up with His Excellency the President of Chile the matter of the adjustment of certain American claims then pending, including, by specific mention, the Alsop claim. In the discussion which at that time took place regarding the settlement of such claims Presi-

<sup>a</sup> II Appendix, p. 200.

<sup>b</sup> II Appendix, p. 198.

<sup>c</sup> I Appendix, p. 41.

<sup>d</sup> I Appendix, p. 13.

dent Santa Maria assured the Minister of the United States that the Government of Chile would honorably settle every just claim upon it, but requested that the Government of the United States—

“postpone any further action in the matter until such time as definite arrangements with her opponents would leave Chile free to consider the questions growing out of the rights of neutrals.”<sup>a</sup>

In reporting this conversation to his Government, the American Minister stated that the President of Chile was most cordial and that upon leaving the President he entertained the conviction that the Government of Chile would honorably arrange for the settlement of American claims in accordance with the principles of law and equity.

With appropriate deference to this request of President Santa Maria that the matter of a settlement of American claims be not at that time pressed, nothing further was done until October, 1884, when the Minister of the United States at Santiago addressed a note to the Minister of Foreign Relations of Chile regarding the settlement of American claims, in the course of which he made the following statement:

“With a feeling of profound friendship for Chile, and appreciating the difficulties in which the Government was placed during the earlier part of the last quarter of a century, my Government has contented itself with simply presenting them to Your Excellency’s Government for consideration, feeling entirely satisfied to await the arrival of a more auspicious moment when the high sense of justice which has always characterized Your Excellency’s Government, would certainly bring about their settlement upon an equitable basis.”<sup>b</sup>

In January, 1885, the Minister of the United States informed the Department of State of his Government that in the course of an interview regarding the settlement of American claims, the Minister of Foreign Relations of Chile had informed him that the Government of Chile had decided not to enter into any other claims commissions than those already agreed upon, and that the Government of Chile would consider all claims upon the old basis of diplomatic negotiations.<sup>c</sup>

In the meanwhile, the two parties, Chile and Bolivia, had, as already stated, negotiated, in April, 1884, a Pact of Truce, with an additional protocol.<sup>d</sup> No provision, however, was made in either of these instruments, for the payment of the Alsop claim, although, as is hereinbefore stated, Mr. Wheelwright, through his attorney,

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<sup>a</sup> I Appendix, p. 42.

<sup>b</sup> I Appendix, p. 43.

<sup>c</sup> I Appendix, p. 46.

<sup>d</sup> II Appendix, p. 164.

Mr. John Stewart Jackson, had, as early as November 21, 1883, in a petition addressed to the Chilean Government, requested that some provision be made for its payment.

Two points in connection with this Pact of Truce and additional protocol should, however, be considered and kept in mind:—

(1st) That the Third Article of this treaty specified that—

“the properties sequestered in Bolivia from Chilean citizens by decrees of the Government, or by measures emanating from civil and military authorities, shall be immediately returned to their owners or to the representatives constituted by them, with sufficient powers.

“The product which the Government of Bolivia may have received from said properties, and which may be proved by documents relating thereto, shall likewise be returned.

“The losses which may have been suffered by Chilean citizens through the causes mentioned, or by the destruction of their properties, shall be indemnified in virtue of the demands which the interested parties shall bring before the Government of Bolivia.”

(2nd) That the Sixth Article, quoted herein, provided for the payment of these Chilean claims.

It reads as follows:

“The returns of that Custom House (Arica) shall be divided in this manner: Twenty-five per cent. shall be applied to the service of the Custom House and to the part which corresponds to Chile for the despatch of the merchandise for consumption in the territories of Tacna and Arica, and seventy-five per cent. for Bolivia. This seventy-five per cent. shall be divided, for the present, in the following manner: Forty parts shall be retained by the Chilean Administration for the payment of the sums which may result as owing by Bolivia in the settlements which may take place, according to the third clause of this pact, and to cover the unpaid part of the Bolivian Loan, raised in Chili in 1867, and the balance shall be delivered to the Bolivian Government in currency or in drafts to its order.”

The parties apparently fearing that this provision as to the disposition of the customs receipts might not be understood, stipulated in the additional protocol the following scheme of apportionment:

“The Minister of Foreign Affairs (of Chile) then stated that, according to the different versions ascribed to the sixth clause, in the part referring to the division which, for the present, is to be made of the seventy-five per cent. corresponding to Bolivia, it might be interpreted in a sense contrary to the wish of the contracting parties; and that, to avoid all difficulty in future, he considered it necessary that it should be declared that, of the total of the receipts of the Arica Custom House, twenty-five per cent. corresponded to the Government of Chili, forty per cent for the indemnities, of which the third clause speaks, and the payment of the Bolivian Loan of 1867, and thirty-five per cent. to the Government of Bolivia, thus completing the one hundred per cent. which was taken to begin with.”

In view of the later contention of Chile—made after the claim of Alsop & Co. had been diplomatically urged upon her attention for a score of years—that this claim was the claim of a citizen of Chile (because Alsop & Co., though composed entirely of American citizens, was registered in Chile), it is a most interesting and significant fact that during all this period, and during the time that Chile was, under this protocol, securing from the Government of Bolivia large sums to liquidate, and which in fact did liquidate, the indebtedness of Bolivia to Chile and to Chilean citizens, not one word was said by Chile of the right of Alsop & Co. to participate in these funds as a Chilean citizen, and not one cent was offered or paid to Alsop & Co. by virtue of this solemn international pact, made and entered into by and between the two Governments for the liquidation of Chilean claims, and yet it is obvious that this disposition of the receipts of the Custom House of Arica entirely ignored the rights thereto possessed by the concessionaries under their contract with the Bolivian Government, and constituted a tortious conversion of the customs receipts which had been fairly, legally, and specifically set apart and appropriated to meet the indebtedness recognized and approved by the Wheelwright contract.

His futile and protracted negotiations with the Government of Chile bear witness to the truthfulness of Mr. Wheelwright's statement, that he had felt that he would finally induce Chile "to listen to my just solicitations," and also of his remark that—

"My subsequent abstention from an appeal to my Government for protection is ample proof of my pacifically-inclined intentions, and I continued on, confiding in the reiterated declarations of Chile about honorable dealings, which I charitably thought would be adopted, and that perhaps the opportune moment had not come. It resulted that new Cabinets were formed and their incumbents gave promises that were never fulfilled."<sup>a</sup>

And it would seem that his remarks upon the terms of the Treaty of 1884 and the provisions therein made for the payment of the claims of Chilean citizens, as contrasted with the claims of aliens, are not entirely misplaced. He says:

"Yet it will be seen that Chile has taken *excessive* care, while disregarding *my* rights, to protect such of her citizens as may have been prejudiced, and which losses originated mainly from mines in Bolivia. Not only so, but to provide therefor, [it] has been stipulated in the treaty-agreement that *Forty per cent* of the Arica Custom House revenue be appropriated to this purpose. In adopting this measure, Bolivia may have been unavoidably obligated, under pressure from

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<sup>a</sup> I Appendix, p. 22

the conqueror, but Chile, already aware of the pledge given in 1876 by the former, becomes a participant, to the exclusion of my previously-acquired rights, as far as that percentage of revenue could be applied.

"The proportion of Thirty-five per cent of the entire receipts from the same source is to be appropriated by Bolivia *with the consent of Chile*, both being stolidly indifferent to what transpired nearly eight years since, and in consequence of belligerent acts until recently, has never been made effective, *much* to the detriment of neutrals, who, as before stated, compose the American firm of Alsop & Co. formerly transacting business in Chile.

"The annual return from the aforesaid Custom House is estimated by the Chilean press not to fall short of \$1,500,000, taking as a basis of collection the receipts of the years 1882 and 1883.

"Supposing that a minimum of (\$1,000,000) one million dollars in silver be realized, there would result an excess of (\$595,000) five hundred and ninety-five thousand dollars over and above the amount formerly paid by Peru to Bolivia. Or granting to Chile, if need be, for indemnity, the twenty-five per cent allotted thereto, and deducting from the remainder on the same basis, the (\$405,000) four hundred and five thousand dollars specified in the contract of 26th of December, 1876, it would appear that *Chile should* pay to the undersigned instead of to Bolivia, the sum of (\$345,000) three hundred and forty-five thousand dollars in silver yearly, or in like proportion, as the said Custom House duties may result to be more or less than the one million dollars in silver, taken as the annual estimate.

"Likewise, it would seem but perfectly equitable that *Chile* should continue to pay in the manner aforesaid until the sum of (\$835,000) eight hundred and thirty-five thousand dollars in silver, distinctly expressed in the contract of 26th December, 1876, and interest thereupon from that date at the rate of five per cent per annum, should cancel the indebtedness of Bolivia to the liquidating firm of Alsop & Co., represented by the undersigned, and formally acknowledged by the aforesaid Government of Bolivia. The foregoing views are humbly submitted as a candid opinion of the case in point, and in view of all that has been experienced hitherto in the way of prejudices, disappointments, evasions, and unjust treatment, but without taking into account adequate compensation for all such during the period of years."<sup>a</sup>

Under date of November 3, 1885, Mr. Wheelwright addressed a petition directly to the Honorable Thomas F. Bayard, Secretary of State of the United States, in which, after narrating the circumstances and grounds of his claim, he concluded:

"And finally, your petitioner prays for the intervention of the Government of the United States that he may obtain redress for the injuries so inflicted upon him by the Government of Chile."<sup>b</sup>

The Department of State at that time gave the case the most careful study and examination, and after due consideration, under date of March 20, 1886, it addressed to its Minister at Santiago

<sup>a</sup> I Appendix, p. 25.

<sup>b</sup> II Appendix, p. 309.



a long and careful instruction regarding the tort side of this claim, in which, after discussing the various authorities treating upon this point, the Government of the United States announced the following conclusion:

"The government of the United States therefore holds that titles derived from a duly constituted prior foreign government to which it has succeeded are 'consecrated by the law of nations' even as against titles claimed under its own subsequent laws. The rights of a resident neutral—having become fixed and vested by the law of the country—cannot be denied or injuriously affected by a change in the sovereignty or public control of that country by transfer to another government. His remedies may be affected by the change of sovereignty but his *rights* at the time of change must be measured and determined by the law under which he acquired them. War is between States, and forms of government may thus be changed and *laws* are forms of government, but cannot act retroactively to destroy neutral rights. The government of the United States is therefore prepared to insist on the continued validity of such titles, as held by citizens of the United States, when attacked by foreign governments succeeding that by which they [were] granted. Title to land and landed improvements is, by the law of nations, a continuous right, not subject to be divested by any retroactive legislation of new governments taking the place of that by which such titles were lawfully granted. Of course it is not intended here to deny the prerogative of a conqueror to confiscate for political offenses, or to withdraw franchises which by the law of nations can be withdrawn by governments for the time being. Such prerogatives have been conceded by the United States as well as by other members of the family of nations by which international law is constituted. What, however, is here denied, is the right of any government to declare titles lawfully granted by its predecessor to be vacated because they could not have been lawfully granted if its own law had, at the time in question, prevailed. This pretension strikes at that principle of historical municipal continuity of governments which is at the basis of international law. Holding as I do that the action of the government of Chili here complained of, by which citizens of the United States have been divested of their property, is in violation of this principle, I am, etc.<sup>a</sup>

However, the Government of the United States, reassured by the new promise of Chile, given in 1885, as above set forth, refrained at the time from pressing this claim upon the attention of that Government, confident in the belief that the Government of Chile pursuant to the assurance given by its President would take advantage of the earliest opportunity to meet this and other claims held by citizens of this Government. Indeed, such was the patience of the United States Government in this matter, that on May 4, 1888, the Minister of Foreign Relations of Chile, of

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<sup>a</sup> I Appendix, p. 50.

his own motion, inquired of the American Minister at Santiago whether or not he, the American Minister, had received instructions in regard to the American claims, to which the American Minister replied, that "a desire not to embarrass Chile in her negotiations with European Powers has kept me from presenting the matter to your Government."

By May, 1888, the Government of Chile seems to have concluded the settlement of the claims of citizens of other powers, either by direct diplomatic settlements or by means of claims commissions, and the American Minister at Santiago, feeling that this cleared the way for the adjustment of American claims, again took up the question of a settlement with the President of Chile, and, calling attention to the fact that the United States had abstained from pressing these claims upon the consideration of Chile, through a desire not to embarrass that Government while it was engaged in negotiations with other powers, stated that the Government of the United States, "naturally solicitous for the interests of its citizens, who for sometime have been pressing their claims upon its attention, would like to negotiate for the appointment of a commission for their adjustment."<sup>a</sup> The American Minister was, however, unable at that time to arrange for the settlement of American claims.

In September, 1890, the Minister of the United States to Chile, at that time Mr. Egan, informed the Department of State of the United States that he had refrained from taking up the question of the claims of American citizens against Chile because of certain strained relations which then seemed to exist between the legislative and executive branches of the Government of Chile. At about the same time the Minister also reported an interview with President Balmaceda, in which the Minister had specifically mentioned the claim of the "late John Wheelwright," and stated that the President of Chile assured him of the readiness of Chile fairly to meet every just and reasonable claim; at the same time the President requested the Minister to furnish to the Minister of Foreign Relations of Chile "a full statement of all United States claims against Chile."<sup>b</sup> Accordingly, in a note addressed to the Chilean Foreign Office under date of August 30, 1890, the Minister of the United States, after calling attention to certain American claims, and after briefly reviewing the postponements which had been made in the matter of their settlement, stated that "in 1884

<sup>a</sup> I Appendix, p. 52.

<sup>b</sup> I Appendix, p. 53.

President Santa Maria had conveyed to Minister Logan the request that their consideration be postponed until 'such time as a definite arrangement with her opponents would leave Chile free to consider the questions growing out of the rights of neutrals,' which time His Excellency the President considered would not be very long."<sup>a</sup>

The Minister of the United States then expressed himself to the President upon this matter as follows:

"Actuated by those sentiments of profound friendship which have ever characterized the relations of the United States of America with her sister republic of Chili, and with the most entire confidence in the honor and sense of justice of the Chilian people, my government has been satisfied to wait until a favorable opportunity for a satisfactory arrangement should present itself."<sup>a</sup>

In a note dated September 30, 1890, the Minister of the United States, in accordance with the suggestion of the President of Chile, furnished to the Chilean Foreign Office a list of the American claims against Chile. Among the claims submitted at this time was that of Alsop & Co., which was set forth as follows:

"No. 2. *Representatives of the late John Wheelwright (the liquidator of Alsop and Company, of Valparaiso)* for a debt of \$835,000 Bolivian dollars, admitted and agreed by contract of the 24th of December, 1876, as being due from the Government of Bolivia to said claimants, and secured by mortgage upon the excess of proceeds from the Northern Custom House over and above the sum of \$405,000 Bolivian dollars each year; and also by an agreement on the part of the Bolivian Government to lease to Mr. Wheelwright, as representative of the Alsop Company for a term of twenty-five years all the Government Estaca mines on the coast of Bolivia, giving him three years to select those which he might consider worth working; which contract has been set aside by the Government of Chili."<sup>b</sup>

Shortly after this, the Governments of Chile and Bolivia entered into a protocol, dated May 19, 1891, in which the settlement of the Alsop claim, or (as it is there designated), the "Lopez Gama credit," was specifically provided for.<sup>c</sup> It was stipulated in Article 2 of this protocol that—

"The Government of Chile will take charge of and assume the payment of the obligations recognized by that of Bolivia in favor of the mineral enterprises of Huanchaca, Corocoro and Oruro, deducting the amounts in accordance with the Compact of Truce, as well as the credits which encumbered the income from the Littoral by reason thereof and which are that of \* \* \* the credit acknowledged in favor [of] Lopez Gama, representing the house of Alsop and Company of Valparaiso, \* \* \*."

<sup>a</sup> I Appendix, p. 55.

<sup>b</sup> I Appendix, p. 56.

<sup>c</sup> II Appendix, p. 372.

Article 3 of the same protocol provided that—

“The sums which make up the credits referred to above as taken from the books of the National Treasurer are as follows:

*	*	*	*	*	*	*
Lopez Gama credit \$835,000						
*	*	*	*	*	*	*

*The sums approximated are considered without interest; and, with which, according to the liquidation made, reach the amount of six million six hundred and four thousand pesos.”*

It will be noted that this treaty specifically recognizes two things: First, that the principal of the Alsop contract obligation is 835,000 Bolivianos, and second, that this amount draws interest.

On June 3, 1892, the Minister of the United States, strictly confining himself to the Alsop & Co. claim, addressed a note to the Chilean Minister of Foreign Relations which reads in full as follows:

“SIR: In view of the pending negotiations between the Government of Y. E. and that of the Republic of Bolivia with the object of establishing and confirming between the two countries a definite treaty of peace, a result which, on the part of my Government, I sincerely hope may be speedily arrived at, to the mutual and entire satisfaction of both Chili and Bolivia, I trust Y. E. will not consider it inopportune to call the attention of Y. E. Government to the claim of the representatives of the United States Commercial House of Alsop and Company, formerly of Valparaiso, the particulars of which Y. E. will find set out in my note of 30th September 1890, addressed to the Ministerio of Y. E. The claim is marked No. 2 in the second series of claims mentioned in said note, and is described as the claim of the ‘Representatives of the late John Wheelwright, Liquidator of Messrs. Alsop and Company of Valparaiso.’

“As Y. E. will perceive the claim is for a debt of eight hundred and thirty-five thousand Bolivian soles (\$835,000) with interest at the rate of five per cent per annum from the year 1876; which debt was solemnly acknowledged by the government of Bolivia and the payment secured by lien upon the income of the Northern Custom House over and above the sum of four hundred and five thousand soles (\$405,000) per year.

“Upon the occupation of Tacna and Arica as the consequence of the war between Chili, and Peru and Bolivia, this arrangement was arbitrarily set aside by the government of Chili to the great loss and suffering of the surviving partners and other representatives of the House of Alsop and Company.

“There are also questions with regard to rights in certain mining property, situated in the territory occupied as above stated, and transferred by the government of Bolivia to the representatives of Alsop and Company as further security in connection with same debt and interest thereon which rights have been refused recognition by the Tribunals of Chili.

"Of these rights under a lawful contract the government of Y. E. was duly informed, anterior to the signing of the convention of truce with Bolivia, in a petition presented to Y. E. government by Mr John Stewart Jackson, attorney for the claimants, dated Valparaiso, September 11, 1882.

"At the urgent request of His Excellency President Santa Maria, conveyed to the United States Minister, Mr. Logan, in February, 1884, the consideration of the claims of United States citizens arising out of the conflict between Chili, Peru, and Bolivia, was deferred, in the words of His Excellency: 'Until such time as a definite arrangement with her opponents would leave Chili free to consider the questions growing out of the rights of neutrals.' From considerations of profound friendship toward the Chilian Government and the Chilian people, my government has, from time to time, up to the present, postponed these claims, although many of the claimants have been suffering great hardships on account of their losses, including some of those interested in this particular one. In view of these considerations, I submit to Y. E. that in whatever definite arrangement may be made between the government of Chili and that of Bolivia, this clearly acknowledged liability to the representatives of the House of Alsop and Company should in right and justice be taken into account and definite provision be made for its early liquidation, a result which, in full reliance upon the high appreciation of international honor which characterizes the government of Y. E., I sincerely hope to see accomplished.

"I shall be prepared to submit to Y. E. in the course of a very few days all of the documents in the case.

"Renewing to Y. E. the assurances of my high consideration and esteem I have the honor to remain,

"Y. E. obedient servant,

"PATRICK EGAN."<sup>a</sup>

On the same day the Minister of the United States communicated a copy of this note to his Government, and on June 11, 1892, referring to his transmitting despatch, he reported to the Secretary of State of the United States as follows:

"I have the honor to refer to my No. 306 of third instant, enclosing a note addressed by me to the Minister of Foreign Relations in regard to the claim of the representatives of the United States Commercial House of Alsop and Company, otherwise known as the 'Wheelwright claim' and I beg to say that on yesterday I had an interview on the matter with the Sub-Secretary of Foreign Relations, and he told me that in consequence of the change of ministry it was not possible, up to that time, to send a written reply to my note of the third instant. He assured me, however, that in the definite (definitive) treaty of peace now being negotiated between Chili and Bolivia, under which Bolivia will cede to Chili all territorial claims upon Arica and Tacna, and Chili will undertake the payment of certain of the exterior debts of Bolivia, the payment of this debt to the representatives of Alsop and Company will be undertaken by Chili."<sup>b</sup>

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<sup>a</sup> I Appendix, p. 58.

<sup>b</sup> I Appendix, p. 60.

The reply of the Chilean Foreign Office to the note addressed by the Minister of the United States, on June 3, 1892, was made on June 18, 1892, and reads in translation as follows:

"I have had the honor to receive Y. E.'s communication dated 3rd instant and in which Y. E. 'in view of the pending negotiations between the government of Bolivia and that of Chile to establish a definite treaty of peace between the two countries' calls the attention of the government of Chile to the claim of the representatives of the American commercial house of Alsop and Company, hoping it will not be considered inopportune by the undersigned.

"Y. E. refers to your communication of 30th September 1890, in which this claim is numbered two among those mentioned in said note, under the name of the late John Wheelwright, Liquidator of the said House of Alsop and Co., asking the payment of a sum amounting to \$835,000 Bolivian pesos with an annual interest of 5 per cent from 1876.

"Y. E. states that this debt was solemnly ratified by the government of Bolivia in the form mentioned and that, as a consequence of the occupation of Tacna and Arica by the Chilean forces the agreement celebrated with Bolivia 'was arbitrarily set aside by the Government of Chile.'

"Y. E. adds some data relating to the matter, the settlement of which Y. E. has been pleased to state the government of Y. E. has several times postponed out of considerations of friendship for the government and people of Chile, and closes asking the government of Chile to take the claim into consideration in whatever arrangement may be celebrated with Bolivia.

"In reply I have the pleasure to inform Y. E. that in the preliminary Protocol of a Treaty of Peace between Chile and Bolivia, ratified by the undersigned in the City of Iquique, as Minister of Foreign Relations of the Constitutional Government, the claim of Alsop and Company, which Y. E. has supported, for the sum indicated by Y. E.—\$835,000 Bolivian pesos—figured among the liabilities that the government of Chile engaged to pay for account of Bolivia.

"Regarding the payment of *interest* to which Y. E. refers, the government of the undersigned awaits what may be done in the negotiations that are to follow by the government that recognized the principal obligation; the government of Chile, which only assumes the obligations of a neighboring and friendly country will endeavor to attend to this part of the claim once the government of Bolivia pronounces upon its legitimacy or validity, confining myself, as a proof of deference to the government of Y. E. to offering the assurance that I will carefully take into account the resolution that may be adopted by the government of Bolivia in relation to this point.

"Upon forwarding what has already been stated the undersigned is pleased that in the Protocol celebrated in Iquique in May 1891, the government of Chile had already taken into account the matter referred to in the esteemed communication of Y. E. to which I have the honor to reply.

"I avail myself of the opportunity, Mr. Minister, to offer to Y. E. the assurances of my high consideration.

"ISIDORO ERRAZURIZ."<sup>a</sup>

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<sup>a</sup> I Appendix, p. 63.

Under date of June 22, 1892, the Minister of the United States reported to his Government that he had forwarded to the Minister of Foreign Relations of Chile—

“particulars of the contract entered into by the Government of Bolivia and reduced to public record in La Paz, the 26th December, 1876, recognizing this interest (the interest upon the debt due under the Alsop contract) in the same way as the principal debt, *which the Sub-Secretary of Foreign Relations assured me would be entirely satisfactory.*”<sup>a</sup>

It is wholly clear that this correspondence contains and sets forth a definite and specific diplomatic promise from the Government of Chile to the Government of the United States to pay this debt, principal and interest.

On August 7, 1892, Patrick Egan, the Minister of the United States at Santiago, and Isidoro Errazuriz, Minister of Foreign Relations of Chile, negotiated a treaty which provided, in Article 1, as follows:

“All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the person or property of citizens of the United States not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile; and, on the other hand, all claims on the part of corporations, companies or private individuals, citizens of Chile, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of Chile, not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the United States, shall be referred to three Commissioners.”<sup>b</sup> \* \* \*

Paragraph (h) of Section 2 of the Rules formulated by this Commission provided as follows:

“If the claim is made in behalf of a corporation or joint-stock company or partnership, the nationality of the same and its domicile must be stated; and *if the claimant is not a corporation or joint-stock company, the name of each person interested both at the date the claim accrued and at the date of verifying the memorial, with the proportion of each person's interest, must be stated.*”<sup>c</sup>

The Commission met in Washington on July 25, 1893, and concluded its sessions on April 9, 1894, on which date the Commissioners declared that—

“Inasmuch as we have not been able to make such an examination of the voluminous testimony in this (The Alsop) case and the important legal questions involved, as would enable us to reach a satisfactory conclusion, we decline to render any judgment thereon.”<sup>d</sup>

<sup>a</sup> I Appendix, p. 61.

<sup>b</sup> II Appendix, p. 1.

<sup>c</sup> II Appendix, p. 12.

<sup>d</sup> II Appendix, p. 424.

On May 18, 1895, there was signed at Santiago a treaty of Peace and Friendship between the Governments of Chile and Bolivia, which again stipulated for the payment of this Alsop obligation. Article 2 of this treaty reads:

"It (the Government of Chile) binds itself furthermore to pay the following debts which encumbered the Bolivian Littoral, namely;  
\* \* \* The credit of Don Pedro Lopez Gama, now represented by the firm of Alsop and Company of Valparaiso."<sup>a</sup>

This undertaking was affirmed and ratified in a supplementary protocol signed at Santiago on May 28, 1895, which provided in Article 3 that—

"those credits which are not included in the declarations aforesaid and which are those of \* \* \* Pedro Lopez Gama \* \* \* shall be examined by the Govt. of Chile, which Government, in order to fix the amount due, and to agree as to the form of payment thereof, will take into account the origin of each credit, and also the antecedents of the same consigned by the Minister of Bolivia in Chile in his memorandum of the 23rd of the present month."<sup>b</sup>

Shortly following the negotiation of this treaty and supplementary protocol, the American Minister at Santiago reported, under date of June 22, 1895, to the Department of State, a conversation between himself and Señor Gutierrez, the Bolivian Minister at Santiago, in which the American Minister stated that he had—

"called his (Señor Gutierrez's) attention to the note of Señor Errazuriz (of June 18, 1892) and inquired whether provision had been made for the payment of the claim as promised in that note \* \* \* the Bolivian Minister, however, informed me that the payment of a number of claims had been provided for (in the treaties pending between Chile and Bolivia) and that among these the claim of Alsop and Company was explicitly mentioned and that the amount fixed in the settlement was eight hundred and thirty-five thousand Bolivianos, the same as stated in the note of Señor Errazuriz referred to above."<sup>c</sup>

In a protocol negotiated between the Republics of Chile and Bolivia, signed at Santiago, April 30, 1896, and designed to be explanatory of the protocol of the 9th of December, 1895, the arrangements for the liquidation of these debts, as provided in the treaty and protocol of May 18th and 28th, 1895, were recognized and confirmed, and there was imposed upon the Government of Bolivia the duty of submitting for the approval of the Bolivian Congress the protocol of May 28, above referred to.<sup>d</sup>

<sup>a</sup> II Appendix, p. 452.

<sup>c</sup> I Appendix, p. 65.

<sup>b</sup> II Appendix, p. 457.

<sup>d</sup> II Appendix, p. 459.



Under date of October 10th, 1896, Mr. Strobel, American Minister at Santiago, reported to the Department of State regarding this claim, in the following language:

"SIR: In reply to the Department's No. 99 of August 10th last, enclosing a letter from the Honorable G. S. Boutwell, and instructing me to ascertain from the Government of Chile the proposed date of settlement of the claim of Alsop and Company, and whether by a treaty or by an understanding between the Governments of Chile and Bolivia the amount to be paid had been fixed, I have the honor to report that yesterday I had a conversation on the subject with Senor Eduardo Phillips, the Under Secretary of Foreign Relations, who gave me the following information:

"On May 28, 1895, a protocol, supplementary to the treaties between Chile and Bolivia forwarded to the Department with my No. 85 of May 6 last, was signed. This protocol was approved by the Chilean Congress, in secret session, but is still awaiting the approval of the Congress of Bolivia, and has, therefore, not been published. It has an important bearing upon the claims assumed by the Chilean Government in accordance with the provisions of Article 2 of the Treaty of Peace and Amity of May 18, 1895.

"According to the memorandum presented by the Bolivian Minister at this capital, which is regarded as part of the protocol, the amount proposed as a settlement of the claim of Alsop and Company is, without calculating interest (*sin computar intereses*) eight hundred and thirty-five thousand Bolivianos of twenty pence, or nine hundred and fifty-four thousand, two hundred and eighty-five Chilean pesos.

"By article 3 of the protocol, the Government of Chile, in order to settle the definite amounts to be paid, shall take into account the origin of the claims allowed, (*el origen de cada crédito*) as well as the data furnished by the Bolivian Minister in his memorandum.

"It is hoped that the protocol will be approved by the Bolivian Congress which is now in session, in a few weeks. The Chilean Government cannot take up the question of the payment of the claims until this protocol has been approved and promulgated.

"On receiving the above information, I inquired of Senor Phillips whether it was to be understood that the terms of article 3 of the protocol gave to his government the right of making a re-examination of the claims; and I stated that if this was the case, it was contrary to the impression existing in the minds of the claimants as well as to my own understanding of the matter. He replied that, in view of the large amounts to be paid, it was natural that his government should desire to examine the papers on which the claims were based; but that he thought that as soon as the protocol was approved and promulgated, there would be no disposition to delay a settlement.

"The Bolivian Minister here, Senor Gutierrez, whom I saw this afternoon, and with whom I spoke upon the subject, also seemed to be of this opinion.

"As soon as the protocol is approved by the Bolivian Congress, I will again call the attention of the Chilean Foreign Office to the claim, with a view to obtaining some more definite assurance regarding its payment."<sup>a</sup>

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<sup>a</sup> Appendix, p. 67.

On May 24, 1897, the Honorable John Sherman, Secretary of State of the United States, and Señor Don Domingo Gana, Chilean Minister at Washington, signed a supplemental convention, reviving the Convention of August 7, 1892, which had "failed, through limitation, to conclude its task," it being provided, in the supplemental convention, that the revived Commission "shall be limited to considering claims duly presented to the former Commission in conformity with the terms of the Convention and with the rules that governed its labors," a certain claim specifically named being excepted.

The Agent of the Government of Chile renewed before the revived Commission the arguments of the Chilean Agent before the first Commission to the effect that, since Alsop & Co. was a partnership, registered under the laws of Chile, it was a Chilean citizen, and that therefore, notwithstanding that all of the partners were American citizens, and that the whole commercial venture, as well as the capital invested, was American, the claim did not fall within the terms of the Convention, which stipulated for the adjudication of "all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of Chile."

But, while the Agent of Chile made this contention before the Commission, he announced, by way of inducement to the Commission to dismiss the claim, in careful and well chosen but clear and specific language, the intentions of Chile with reference to the settlement of this claim. His exact words are as follows:

"As is stated in the claimant's brief, it is among the liabilities that the Government of Chile engaged to pay *for the account of Bolivia*. This explains exactly the situation of the claim. The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia toward the claimant; and in order to induce the Bolivian government to sign the definite treaty of peace which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and is its position to-day, and if Bolivia signs the treaty, the claim of Alsop & Company, as well as the other claims mentioned, will be promptly paid under the treaty engagement as a relief to Bolivia from the liabilities which that government has incurred and for the account of Bolivia."<sup>a</sup>

After due deliberation the majority of the Commission (the American Commissioner dissenting, in an able and powerful decision) decided in favor of the contention of the Chilean Agent,

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<sup>a</sup> II Appendix, p. 569.

and dismissed the claim for want of jurisdiction, stating, however, that this was without prejudice to any rights which the claimant, or claimants, or Alsop & Co., or its liquidator, might have, either by diplomatic intervention, or before the Government of Chile or the courts of Chile. In rendering this decision, the Commission, after discussing the arguments advanced by the Agents of the respective Governments, and after considering the precedents advanced by the Agent of the United States in support of his contention (one of which, the Cerruti case, was directly in point), concluded their opinion with the following statement:

"By this conclusion it is not denied that certain cases may arise (like the Cerruti case) in which redress may justly be granted by means of diplomatic intervention to an individual member of a society for injury to the partnership property. The demurrer is sustained wholly upon the ground that Alsop and Company, in liquidation, being a citizen of Chile, this Commission, under Article I of the Convention of 1892, has no jurisdiction to entertain the claim. The case is dismissed, therefore, without prejudice, however, to any rights which the claimant, or claimants, or Alsop & Company, or its liquidator may have, either by diplomatic intervention or before the Government of Chile, or the courts of Chile. Nor are the merits of the claim in any way prejudiced by this decision. According to the brief of the Honorable Agent of Chile, it is declared that this claim 'is among the liabilities that the Government of Chile engage to pay for the account of Bolivia. \* \* \* The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia towards the claimant; and in order to induce the Bolivian Government to sign the definite treaty of peace, which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and is its position to-day, and if Bolivia signs the treaty, the claim of Alsop and Company, as well as the other claims mentioned, will be promptly paid under the treaty engagement, as a relief to Bolivia from the liabilities which that Government has incurred and for the account of Bolivia.'

"The claimant is, therefore, remitted for relief to the Government of Chile, whose assurances are thus given, and the case is dismissed." <sup>a</sup>

The Government of Chile having thus, in the most formal manner, undertaken to adjust this claim upon the conclusion of the then pending final treaty between itself and Bolivia, the Government of the United States, relying upon this clear and unambiguous promise, was content, without then further pressing upon the Chilean Government the question of the settlement of this claim, to wait reasonably upon the convenience of Chile, before again suggesting a liquidation of the indebtedness.

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<sup>a</sup> II Appendix, p. 569.

Having waited for a period of almost two years without (so far as the Government of the United States was aware) the Government of Chile having made any proposal looking to a settlement of the claim, the Department of State, in November, 1902, instructed the American representative at Santiago to bring the matter in a friendly and amicable way again to the attention of the Chilean Government, the Department stating that it felt "the necessitous condition of the claimants and their acknowledged equities, justify an appeal to the sense of justice and especially to the comity of the Chilean Government to take some action looking to the relief of the claimants."<sup>a</sup>

The American Minister, acting upon these instructions, addressed a friendly note of reminder to the Chilean Foreign Office under date of December 29, 1902, in which he pointed out the equities of the claim, the formal undertaking of the Agent of Chile before the Claims Commission that the Government of Chile would settle the claim, and to the judgment of the tribunal dismissing the claim for want of jurisdiction, but without prejudice to any right which the claimant, or claimants, or Alsop & Co., or its liquidator, might have, either by diplomatic intervention or before the Government of Chile or the courts of Chile, and stated that it would greatly please him to be informed whether the Government of Chile was not now prepared to consider the matter of the adjustment of this claim.

The reply of the Minister of Foreign Relations, received by the American Minister on January 17, 1903, is a remarkable as well as an interesting document. In this document the Government of Chile, for the first time in the history of the long and difficult negotiations for the settlement of this claim (which at this time had extended over a period of almost twenty years), began to suggest a doubt as to the obligation of Chile to pay this claim, and used language calculated to justify the inference that, notwithstanding the plain and simple language of the Commissioners, who dismissed the claim "without prejudice" and who formally declared "nor are the merits of the claim in any way prejudiced by this decision," and who specifically and in terms incorporated the assurances of the Chilean Agent regarding Chile's oft-expressed intention to liquidate this liability, the Government of Chile was now prepared to contend that the decision of this tribunal was a bar to the further consideration of this claim by the two Governments. The essential portions of this note read as follows:

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<sup>a</sup> I Appendix, p. 71.

"Prima facie, given the terms of the treaty of 1892 which organized the Court of Arbitration of Washington, there seems to be no doubt that all discussion should be inadmissible between the Government of the United States of America and that of Chile with regard to claims about things which happened before the date of the treaty cited, which subjects of both countries should try to present against the contracting Governments, much more so if sentence has already been rendered on these claims by the Honorable Court of Washington.

"Notwithstanding, as Y. E. considers that the statements of the ex-agent of Chile before the cited Court, and the reservations made by it in its sentence, my government might perhaps desire to favor persons who owing to circumstances foreign to the claim, are very badly off, as deference to Y. E. this Department will have no objection to investigating whether there is something in the antecedents referred to, which would allow a modification of the spirit of the Treaty of 1892.

"As the antecedents I refer to are in transit remitted by the Chilean Legation in Washington, as soon as they are received in this Department, the undersigned will have the honor to answer the note of that Legation of December last in a more concrete manner."<sup>a</sup>

To this remarkable document, the American Minister replied, under date of January 25th, calling attention to certain errors in the Spanish translation of the English text of his note, particularly with reference to the word used to render the English word "dismissed" and said:

"The decision of the Commission was that it had no proper jurisdiction for the consideration of the claimant's case; but at the same time, it clearly recognized the justice of the claim, and the representative of the Chilean Government before the tribunal acknowledged the moral responsibility of his Government to pay the same at some future time."<sup>b</sup>

On February 9, 1903, the Chilean Minister of Foreign Relations, acknowledged the above, admitted that there was really an unintentional interpolation of the sentence pointed out by the American Minister, and concluded, after commenting upon the meaning of the word "dismissed":

"I might also make some rectifications of concept which are suggested to me by reading the two notes of Y. E. about this matter; but I have considered it more convenient to await the arrival of the necessary documents in order to appreciate the matter in due form, the remittance of which documents has already been announced to us by our diplomatic representative in Washington."<sup>c</sup>

Information as to this exchange of notes not having reached the Department, the Secretary of State of the United States, under date of May 13, 1903, directed the American Minister to "press the Chilean Government for an answer to the representations"

<sup>a</sup> I Appendix, p. 74.

<sup>b</sup> I Appendix, p. 75.

<sup>c</sup> I Appendix, p. 77.

which were to have been made under the instruction of November 6, 1902, and concluded:

"The equity of the claim is established, nay, is even admitted, and the Department feels that a generous sum should at least as an act of consideration for the necessities of the claimant, be advanced by the Government of Chile. Such considerate action would be greatly appreciated by the Government of the United States, and you will so advise the Chilean Government."<sup>a</sup>

Nothing further having been heard, the Department, under date of June 11, cabled its Minister asking whether or not he could report progress in the Alsop case.

Under date of June 13, the American Minister informed the Department that the Minister of Bolivia at Santiago, Señor Gutierrez, had informed him that the Alsop claim was one of those which according to the stipulations of the treaty of Peace and Amity between Chile and Bolivia then under negotiation, would be assumed and paid by Chile.<sup>a</sup>

Rumors having been circulated that the pending negotiations between Chile and Bolivia had been broken off, or indefinitely suspended, the American Minister at Santiago took up the matter with the Minister of Foreign Relations, particularly with reference to the payment of the Alsop claim, whereupon the Minister of Foreign Relations stated that he would soon be in a position to make a cash offer to the claimants of Alsop & Co., in satisfaction of this long pending claim and if the same was not accepted the amount tendered would be handed over to Bolivia and the Alsop creditors, together with such others as might decline to accept a direct cash settlement with Chile, would be referred to La Paz for negotiation with the Bolivian Government.<sup>b</sup>

On December 4, 1903, Minister Wilson telegraphed the Department that the Chilean Minister for Foreign Relations wished to know if an offer of 954,285 Chilean pesos of 18 pence would be accepted in settlement of the Alsop claim, payment to be made, at the option of the Chilean Government, either in Chilean gold dollars of 18 pence, or in Chilean 5 per cent bonds at the rate of 18 pence per Chilean dollar reduced to pounds sterling, and added that in case the claimants should decline this offer the said sum of Chilean bonds would be paid to the Government of Bolivia, which would then assume the responsibility and settle with the claimants.<sup>c</sup>

<sup>a</sup> I Appendix, p. 78.

<sup>b</sup> I Appendix, p. 79.

<sup>c</sup> I Appendix, p. 80.

This offer amounted to \$343,542 American gold. At the time this offer was made, the mere principal of the debt recognized by the Wheelwright contract amounted to \$805,775 American gold (reckoned at the value of the Boliviano at the date of the contract), while the interest due under the contract, at the time this offer was made, amounted to the further sum of \$1,087,796.25, the two sums due at that time amounting to \$1,893,571.25. This does not take into consideration the unpaid portion of the \$222,625.50 American gold, which the contract recognized as interest due, at the date of its making; nor does it take into consideration the large sums due from Chile to the claimants as damages for illegal interference by Chile with mining rights held by the concessionaries in the littoral. It can scarcely be wondered that the Department found itself obliged to telegraph to Mr. Wilson on December 17, 1903, that the Alsop claimants declined the offer as inadequate, and that the Department, unable to recommend acceptance, held the question of intervention under consideration, but that it earnestly hoped a just settlement would be reached without having to decide the question.<sup>a</sup>

On March 1, 1904, the American Minister concluded a note, which dealt in some fullness with the value of the contract side of the claim and Chile's obligation to pay the same, with the following language:

"In conclusion, I have the honor to call Your Excellency's attention to the frequent official recognition by your Government, of the justice of this claim, and to express the hope that it may be found possible to make such an arrangement with these creditors, and such an offer in settlement of their claims as the Government of the United States, may with due regard for their just interest, recommend the acceptance of."<sup>b</sup>

On May 6, 1904, the Department instructed its Minister that the Department was unable to entertain the opinion that the Chilean Government had so far made an equitable offer of settlement, which should include substantial compensation for the damages suffered by the claimants,<sup>c</sup> and on June 9, 1904, the Department instructed its Minister by cable to advise the Chilean Government that—

"the United States Government expects that a just and reasonable indemnity will be made in the Alsop claim, some of the claimants being in great need; that the United States Government expects a prompt and equitable payment of this claim adequate to the losses

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<sup>a</sup> I Appendix, p. 81.

<sup>b</sup> I Appendix, p. 84.

<sup>c</sup> I Appendix, p. 85.

sustained by the claimants; that such a settlement would not be unjust to the Chilean Government and would be very much appreciated by the United States Government."<sup>a</sup>

On June 14, 1904, the American Minister reported to the Department that the Chilean Minister of Foreign Relations had informed him that the Chilean Government would become responsible for the settlement of the Alsop claim after and following the ratifications of the definite treaty of peace and amity with Bolivia; that the Chilean Minister of Foreign Relations authorized him to say that the treaty was assured, and would be concluded within three months; and that immediately thereafter he would take up the Alsop claim, giving it special, just, and even generous consideration.<sup>a</sup>

The Minister confirmed this cable under date of June 18, 1904, and referred to his conversation with the Minister of Foreign Relations for Chile, in the following language:

"Upon the 13th, having recovered sufficiently to attend to business, I visited the Minister, Senor Don Emilio Codecido, and in the interview which took place, I called his attention to the urgent telegram which I had just received from the Department, relative to the Alsop claim. I recited to him the history of the case, and called his attention to the long continued injustice, to which the claimants had been obliged to submit, and to the patience of the Government of the United States, in dealing with the claim before the Chilean Government. I said to the Minister clearly and emphatically, that these continuous delays, and manifest neglect of international obligations, had made a very bad impression in Washington, and I hoped that His Excellency would join with me in removing that impression, by satisfying the demands of the Alsop claimants, justly and promptly.

"The Minister replied, that he had every disposition to meet the demands of the claimants, and to gratify the expressed wish of the United States, but that the Government of Chile could not depart from the position which it had taken, and to which it still adhered, i. e., that the payment of these claims was assumed by Chile contingent upon the signing of the definite Treaty of Peace and Amity with Bolivia. According to the views of the Chilean Government, this is the strict and just construction of the Treaty of Ancon.

"The Minister stated, however, that the treaty with Bolivia would be signed and ratified within three months, and that he would authorize me to state as much to my Government. He added, moreover, that as an evidence of his Government's desire to gratify the desires of the Government of the United States, the Alsop claim would be taken up immediately after the ratification of the Treaty with Bolivia, and given special, and even generous consideration. I replied, that while my Government did not accept the views of

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<sup>a</sup> I Appendix, p. 86.



the Chilean Government, relative to its obligations in the premises, the expressions of its intentions for the future, would be highly appreciated.”<sup>a</sup>

The substance of this conversation was embodied in a note dated June 21, 1904, from the American Minister to the Minister of Foreign Relations of Chile, which reads as follows:

“Upon the 13th inst., I had the honor to confer with Your Excellency relative to the Alsop claim, and expressed to you, after having submitted to your inspection the urgent telegram concerning the claim, just received from my Government, the pressing necessity for early consideration of this long pending obligation, and how greatly decisive action by Your Excellency’s Government would be appreciated by the Government of the United States.

“Your Excellency’s reply to the observations which I had the honor to make on this occasion was, briefly, that the Chilean Government had held, and continued to hold, the claim of Alsop and Company, as an obligation payable by the Chilean Government, contingent only upon the signing of the definite treaty of peace and amity with Bolivia, Your Excellency adding moreover, that this treaty would, without any doubt, be signed and ratified by the Governments of Bolivia and Chile, within the term of three months, and that I might consider myself authorized to convey information to this effect, to my Government. Continuing, Your Excellency was good enough to add, that immediately following the ratifications of the treaty, the Chilean Government would address itself to the consideration of the Alsop claim, and out of deference to the expressed wish of the Government of the United States, and the necessitous condition of the claimants, would give to it, special, just, and even generous consideration.

“Upon the same date of my interview with Your Excellency, I conveyed, by cablegram, to my Government, the substance of your statement, as recited above, and upon the 15th, I received the following reply:—

“‘Express to Minister for Foreign Affairs the President’s appreciation of assurances given and communicated by your cablegram. On this basis Department is confident the matter will be satisfactorily adjusted at the period named.’”<sup>b</sup>

Under date of July 2, 1904, the Minister of Foreign Relations replied to the above in the following language:

“I have the honor to acknowledge the receipt of Your Excellency’s note dated 21st ult., in which Your Excellency, referring to the conversation with the undersigned respecting the Alsop claim, transcribes to me the following cablegram sent by your Government to that Legation on the 15th of said month:

“‘Express to Minister for Foreign Affairs the President’s appreciation of assurances given and communicated by your cablegram. On this basis Department is confident the matter will be satisfactorily adjusted at the period named.’

“In this respect, it corresponds to me to reiterate to Your Excellency that the Alsop claim is included among the other claims for

<sup>a</sup> I Appendix, p. 87.

<sup>b</sup> I Appendix, p. 88.

credits weighing on the Bolivian coast, the payment of which will be assumed by Chile on the terms to be established in the respective treaty at the close of the negotiations at present going on towards that object between the Governments of Chile and Bolivia. Only then will it be possible for the undersigned to give to the said Alsop claim the attention it deserves."<sup>a</sup>

On August 9, 1904, notwithstanding the Department was convinced that the Government of Chile was obligated to pay this debt for and on behalf of Bolivia—1st, because of the arbitrary appropriation of the customs receipts which had been allocated to the payment of the debt; 2nd, because of the repeated promises made to Bolivia to pay the debt; 3rd, because of the formal promise of the Government of Chile before the Claims Commission to adjust the claim; and 4th, because of the many direct promises made by Chile to satisfy this obligation, and notwithstanding, further, that it was equally clear in its opinion that the Government of Bolivia could not relieve itself from liability on the original contract until that Government had in some way secured the liquidation of the same, the Department instructed its Minister to present the claim to the Bolivian Government and to ask for its prompt and careful consideration and for the payment of a just and equitable indemnity for the claimants.

Finally, on October 20, 1904, the Governments of Chile and of Bolivia entered into the long delayed and much discussed joint treaty,<sup>b</sup> in article 5 of which it was provided as follows:

"The Republic of Chile devotes \* \* \* the sum of two million pesos in gold of eighteen pence in the same form as the preceding for the cancellation of the credits arising from the following obligations of Bolivia: \* \* \* the debt recognized to Don Pedro Lopez Gama, represented by Messrs. Alsop and Company, subrogates of the former's rights \* \* \* ."

Regarding the extent to which the Government of Chile had by this undertaking obligated herself to meet Bolivia's debts it appears that the Government of Bolivia, seemingly in fear that some doubt might in the future arise, set forth its understanding of the undertaking of the Government of Chile in the following note:

"LEGATION OF BOLIVIA,  
"Santiago, October 21, 1904.

"Mr. MINISTER: The Government of Bolivia agrees with Your Excellency's Government on the necessity of determining the purport of the wording of Article 5 of the Treaty of Peace and Friend-

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<sup>a</sup> I Appendix, p. 90.

<sup>b</sup> I Appendix, p. 440.

ship signed today by Your Excellency on behalf of the Government of Chile and by the undersigned in representation of the Government of Bolivia.

"Both in regard to the claims of the Corocoro, Huanchaca, and Oruru companies and of the bond holders of the Bolivian loan of 1867 which were being paid out of 40% of the receipts of the Arica Custom House, and in regard to the claims against Bolivia of the bond holders of the Mejillones railroad, of Alsop & Co., (assignees of Pedro Lopez Gama), of the estate of Juan Garday, and of Edward Squire (representing the rights of John G. Meiggs), it has been agreed that the Government of Chile shall permanently cancel all of them, so that Bolivia shall be relieved of all liability, the Government of Chile being obligated to answer every subsequent claim presented either by private means or through diplomatic channels, and considering itself liable for every obligation, bond, or document of the Government of Bolivia relating to any of the claims enumerated, Bolivia's liability being entirely eliminated for all time and the Government of Chile assuming all liabilities to their full extent.

"My Government desires that Your Excellency may be pleased to state to me, on behalf of the Government of Chile, whether this is the purport which it has given to article 5 of the Treaty of Peace and Friendship signed today between the representatives of the two Governments.

"I avail myself of this opportunity to renew to Your Excellency, the assurances of my high and distinguished consideration.

"(Signed.) A. GUTIERREZ."

"To His Excellency

"Mr. EMILIO BELLO C., Minister of Foreign Relations,

"City."<sup>a</sup>

To this the representative of the Government of Chile replied as follows:

"No. 1008.

"REPUBLIC OF CHILE,

"MINISTRY OF FOREIGN RELATIONS,

"Santiago, October 21, 1904.

"Mr. MINISTER: In reply to the note which Your Excellency addressed to me on this day I take pleasure, in compliance with your request, in defining the purport which this Chancellery assigns to clause 5 of the Treaty of Peace and Friendship signed today by Your Excellency in representation of the Government of Bolivia and by the undersigned on behalf of the Government of Chile.

"My Government considers that the obligation which Chile contracts by Article 5 of the said Treaty comprises that of arranging directly, with the two groups of creditors recognized by Bolivia, for the permanent cancellation of each of the claims mentioned in said article, thus relieving Bolivia of all subsequent liabilities.

"It is consequently understood that Chile, as assignee of all the obligations and rights which might be incumbent on or pertain to Bolivia in connection with these claims, shall answer any reclama-

<sup>a</sup> I Appendix, p. 444.

tion which may be presented to Your Excellency's Government by any of the parties interested in the said claims.

"I renew to Your Excellency the assurance of my highest and most distinguished consideration.

"(Signed) EMILIO BÉLLO C.

"To His Excellency

"Mr. ALBERTO GUTIERREZ, E. E. & M. P. of Bolivia,"<sup>a</sup>

"[SEAL]"

These notes seem clearly to establish [that although if read alone the bare treaty provisions might perhaps be construed to place a limitation upon the amount which the Government of Chile was to pay upon the debts recognized as existing against the Government of Bolivia, yet that in reality the Government of Chile obligated itself to pay the entire amount which should be found due upon these debts, irrespective of the question whether or not it might be able to do so from the sum specifically named in the treaty.

In December, 1904, the Government of Chile made a direct offer of settlement to the claimants, this time, however, offering but 524,333 Chilean pesos, equivalent to \$190,647.00 American gold. At the time this offer was made the value of the debt arising out of the contract (estimated as above), to say nothing of the tort liability, amounted roughly to \$1,930,000. The Department of State of the United States, having already characterized as inequitable an earlier offer which was almost as much again as this second offer, at once declined to urge upon the claimants the acceptance of the proposed sum and stated, in an instruction to its Minister, that—

"the Department begs to say that the amount appears to be entirely inadequate to the just satisfaction of the claim, and not in accordance with the previous assurance given by the Chilean Minister for Foreign Affairs to the United States Minister at Santiago that the Alsop claim should receive just and even generous treatment. The amount offered appears to be disproportionate to the claimants' equity, considered in itself, to which consideration (it) should be added that the claimants have waited a very long time in the vain hope that substantial compensation would be rendered to them for the obligation which accrued against Bolivia, and which, it is understood, was incurred by the Government of Chile."<sup>b</sup>

Pursuant to directions given by the Government of the United States under date of April 30, 1907, the Legation at Santiago again presented the matter to the Chilean Government on June 27, 1907, and after a considerable number of interviews upon the

<sup>a</sup> I Appendix, p. 444.

<sup>b</sup> I Appendix, p. 91.

matter, the Minister of Foreign Relations of Chile, Mr. Puga Borne, authorized the American Chargé d'Affaires to make to this Government by cable the following statement regarding this claim:

[Paraphrase.]

The Minister of Foreign Relations authorizes me to say that the obligation of the Chilean Government toward Alsop & Co. is limited by Article 5 of the treaty with the Bolivian Government. An offer is made of 568,192.67 Chilean pesos in gold, which amount is retained in the treasury by judicial order pending the decision designating real claimant, at which time the sum will be paid upon the express condition that acknowledgement of the full amount of the claim be made by claimant, thus canceling the indebtedness of both the Government of Chile and that of Bolivia.<sup>a</sup>

In reporting this action the Chargé added:

"The Minister states that the amount above given constitutes the final offer of Chile. If the claimants are unwilling to accept it in full satisfaction they are invited to turn for payment to Bolivia."<sup>b</sup>

The Department of State informed its Minister at Santiago that the claimants declined to accept the sum tendered by the Chilean Government upon the terms stated, adding that in view of the fact that the sum was more than one-third less than a sum previously offered by Chile, which offer was itself declined by the Department of State as being inadequate, the Department found itself unable to recommend the acceptance of the offer.

It should be observed that at the time this offer was made the contract debt, principal and interest, exclusive of the previously accrued interest, acknowledged as due by the contract itself, amounted (estimated as above) to \$2,287,471.25. The offer of Chile at this time amounted to about \$200,000 American gold.

On November 11, 1907, the Minister of Foreign Relations informed the American Minister at Santiago that in making the last offer of settlement, the Government of Chile had omitted from the sum named certain items of accrued interest, which would raise the sum offered from 568,192.67 Chilean gold pesos to 589,870.30 Chilean gold pesos, at 18 pence.<sup>c</sup>

Under date of April 9, 1908, the Minister of Foreign Relations of Chile addressed to the American Minister at Santiago a lengthy note, in which the Minister of Foreign Relations set forth in considerable detail the attitude of the Chilean Government regard-

<sup>a</sup> I Appendix, p. 108.

<sup>b</sup> I Appendix, p. 110.

<sup>c</sup> I Appendix, p. 111.

ing the Alsop claim and its relation thereto, and in which he made a further offer, this time stating that—

“my Government is ready to pay, in bonds, and in consideration of the total cancellation of the claim, the sum of 524,332.81 pesos gold of 18d each as principal, and 78,649.92 pesos in gold coin at 18d each as interest on coupons due thereon (including the coming coupons, which will be due June 10). The bonds earn 5 per cent interest and have an accumulative sinking fund of 1 per cent per annum.”<sup>a</sup>

In a note dated July 31, 1908, the Chargé d’Affaires of the Chilean Legation at Washington forwarded to the Department of State a copy of the same note of the Chilean Minister of Foreign Relations, using in his note of transmission the following language:

“It is also my duty to inform Your Excellency, in pursuance to instructions received, that this Legation is only authorized to furnish to the State Department, if Your Excellency should deem desirable, antecedents and information regarding this case, the negotiations regarding which have been and are still being conducted in Santiago.”<sup>b</sup>

The Department of State, moved to feel by these persistent offers of a sum apparently so inadequate to the equities of the claimants under their contract, that perhaps the Government of Chile was in possession of facts of which the Government of the United States was ignorant, and which would justify the reduction proposed by the Government of Chile, and taking advantage of this kindly offer of the Chilean Legation at Washington, requested, under date of August 29, 1908, that the Minister of the Republic of Chile at Washington should furnish to the Department “copies of the documents and a statement of the evidence which your (the Chilean) Government regards as justifying the reduction which it proposes.”<sup>c</sup> In making this request the Department of State indicated that it did so because it was animated by a desire to make, as to the matter of the settlement of this claim, no request which equity and justice did not support. No reply having been received by it to this note, the Department of State repeated its request on November 24, 1908.<sup>d</sup> On November 26, 1908, the Minister of the Republic of Chile at Washington stated that he had informed his Government of the request and that he would communicate with the Department of State upon receiving the documents requested.<sup>e</sup>

<sup>a</sup> I Appendix, p. 142.

<sup>c</sup> I Appendix, p. 144.

<sup>e</sup> I Appendix, p. 147.

<sup>b</sup> I Appendix, p. 112.

<sup>d</sup> I Appendix, p. 145.

On January 24, 1909, the Department of State, still not having received the documents promised, instructed the Minister of the United States at Santiago, by cable, to inform the Government of Chile that the Department of State, being most desirous of reaching a fair and equitable determination upon this whole matter, awaited the antecedents mentioned by the Minister of Chile and requested by the Department of State.<sup>a</sup> On February 26, 1909, the Minister of the United States at Santiago cabled the Department of State that he had received a reply from the Minister of Foreign Relations of the Government of Chile in which it was stated that the antecedents called for by the Department of State had on the same date been sent to the Minister of Chile at Washington.<sup>b</sup> On March 18th the Department of State communicated the substance of this telegram to the Minister of Chile at Washington and requested that he forward to it at his earliest convenience the documents which his Government was then forwarding to him.<sup>b</sup> This note the Minister of Chile acknowledged under date of March 19th, and assured the Department of State that he would hasten to transmit to it whatever information he might receive bearing upon the subject.<sup>c</sup> Nothing having been heard in the meanwhile, and the evidence which the Chilean Foreign Office stated had been forwarded to the Legation of Chile at Washington not having been received, the Secretary of State of the United States on April 15th, took up the matter personally with the Minister of Chile at Washington. In the course of an interview which followed, the Minister of Chile stated that the Government of Chile had no evidence such as that called for, that is, evidence going to show that the amount due under the contract was not really due the claimants, and that to justify its reduction the Government of Chile relied upon the fact that the sums specified in the treaty between the Governments of Chile and of Bolivia for the settlement of this and other claims was not sufficient to meet in full the demands of all the claimants, and that the amount offered Alsop & Co. was its pro rata share of the sum so stipulated to be paid.<sup>d</sup>

It would thus appear from this correspondence and from this statement made orally by the Minister of Chile at Washington that the Government of Chile has no evidence going to show that the amount called for, principal and interest, by the contract

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<sup>a</sup> I Appendix, p. 147<sup>c</sup> I Appendix, p. 150.<sup>b</sup> I Appendix, p. 148.<sup>d</sup> For Memorandum of interview, see I Appendix p. 150.

between John Wheelwright as liquidator for Alsop & Co. and the Government of Bolivia is not legally and equitably due the claimants.

Indulging the conviction that, if Chile had no evidence going to show that the whole amount called for by the contract was not equitably due, then the Government of Chile should, pursuant to its many solemn promises and undertakings made to the Government of the United States and to Bolivia to settle this claim, make some adequate offer to meet the liability imposed by the Wheelwright contract, the validity of which has never been questioned by either Bolivia or Chile, the Department of State directed the American Minister at Santiago to present to the Government of Chile a *note diplomatique* in which, after setting forth the facts in the case as above mentioned, it was stated that the Government of the United States confidently expected that the Government of Chile would at once either make such a settlement of this controversy as should comport with the equity of the claimants and with the dignity and international integrity of Chile or pursuant to a suggestion made by the Government of Chile, immediately agree with the United States upon a protocol submitting the entire controversy to an arbitral tribunal for a decision of the case upon the merits in accordance with the broad principles of equity and international law. The Government of the United States at the same time indicated that it felt most deeply that the added expense and delay which this latter course would entail upon the claimants were, under the existing circumstances, without warrant and not to be justified.<sup>a</sup>

In case, however, Chile elected to arbitrate, the Government of the United States submitted with the note a draft of protocol of submission.

The Government of Chile having upon the receipt of this alternative proposal elected to arbitrate rather than to settle the claim, the Minister of the United States at Santiago formally submitted the draft protocol which had been incorporated in the note already delivered to the Chilean Government. This draft protocol provided in the broadest possible terms for the submission to the arbitration tribunal of the entire controversy between the two Governments.

Under date of October 15, 1909 (the note was not actually delivered until November 27th), the Minister of Foreign Relations of

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<sup>a</sup> I Appendix, p. 157.



Chile replied to this note of the American Minister and therein set forth the views of the Chilean Government regarding the matters discussed in the American note.<sup>a</sup>

From the time of the delivery of the American note until December 1, negotiations proceeded between the representatives of the respective Governments at Santiago looking to the submission of the dispute between the two Governments to arbitration, and on the date last named the Protocol was signed submitting the matter to His Britannic Majesty Edward VII for determination, which Protocol the two Governments have already had the honor to bring to Your Majesty's attention.

Therefore in view of, and pursuant to, the provisions of that Protocol, which stipulates that,—

“The full case of each Government shall be submitted to His Britannic Majesty, King Edward VII, and to the other Government through its duly accredited representative at St. James, within six months from the date of this agreement” —

The Government of the United States of America now submits in detail for the consideration and determination of His Britannic Majesty, the following documents, evidence, correspondence, allegations, and arguments, in *THE CASE OF THE UNITED STATES*, the elements of which case and the allegations and contentions concerning which, are arranged in accordance with the plan hereinafter set forth:<sup>b</sup>

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<sup>a</sup> I Appendix, p. 210.

<sup>b</sup> It will be observed in all the discussions which follow, that each document has been fully quoted in its essential parts wherever used even though it has been already quoted in full and is to be so quoted thereafter. This has been done with the thought that such a course would facilitate the study of the case, since it would avoid the necessity, otherwise present, of turning forward or back in order to consult the exact text of the quotation used.

## POINT I.

THE GOVERNMENT OF THE UNITED STATES, FOR AND IN BEHALF OF MR. JOHN WHEELWRIGHT, MR. GEORGE FREDERICK HOPPIN, MR. HENRY W. ALSOP, MR. JOSEPH W. ALSOP, MR. EDWARD McCALL, MR. GEORGE G. HOBSON, MR. GEORGE J. FOSTER, MR. THEODORE W. RILEY, MR. HENRY CHAUNCEY, AND MR. HENRY S. PREVOST, AMERICAN CITIZENS (THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES), FORMERLY DOING BUSINESS IN CHILE UNDER THE FIRM NAME OF ALSOP AND COMPANY, ALLEGES, CONTENTS, AND MAINTAINS THAT THE CONTRACT OF 1876 MADE BY AND BETWEEN JOHN WHEELWRIGHT, AS LIQUIDATOR FOR ALSOP AND COMPANY, AND THE GOVERNMENT OF BOLIVIA (THE VARIOUS OBLIGATIONS OF WHICH CONTRACT HAVE SINCE ACCRUED AGAINST AND BEEN ASSUMED BY THE GOVERNMENT OF CHILE) IS A VALID AND LEGAL INSTRUMENT NEGOTIATED AND CONCLUDED IN STRICT ACCORDANCE WITH BOLIVIAN LAW, AS PROVED BY THE FOLLOWING FACTS AND CIRCUMSTANCES:

### *Sub-Point A.*

The contract was duly and properly negotiated and concluded by officers of the Bolivian Government having authority to make such contract.

### *Sub-Point B.*

The contract thus legally negotiated and concluded by the Executive Department of the Bolivian Government was duly and properly ratified and approved by the Bolivian Congress.

### *Sub-Point C.*

The contract so made and ratified has been repeatedly recognized as a valid and binding instrument by the Governments both of Chile and of Bolivia.

C<sup>1</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Government of Bolivia in and by a number of executive decrees promulgated for the express and specific purpose of carrying this contract into effect.

C <sup>2</sup> The validity and binding effect of this contract have been recognized and approved by the Government of Bolivia as well as by the Government of Chile in the diplomatic correspondence passing between those two Governments.

C <sup>3</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Government of Bolivia in its diplomatic correspondence with the Government of the United States.

C <sup>4</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Governments of Bolivia and Chile in the various formal protocols and treaties made by and between said Governments, in which protocols and treaties provision has been expressly made for the payment of the debt recognized as due by said contract.

C <sup>5</sup> The validity and binding effect of this contract have been recognized and approved by the Government of Chile in a number of executive decrees issued to its officers of local administration concerning the enforcement and operation of this contract, after the occupation of the Bolivian Littoral by the Chilean forces.

C <sup>6</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Government of Chile in its diplomatic correspondence with the Government of the United States.

C <sup>7</sup> The validity and binding effect of this contract have been recognized and approved by the Chilean courts in cases prosecuted by said Wheelwright before said courts, said cases involving and depending upon rights claimed by said Wheelwright under said contract.

C <sup>8</sup> The validity and binding effect of the Wheelwright contract were distinctly recognized by the Government of Chile through its Agent before the United States and Chilean Claims Commission in 1901, at which time a specific promise was made to pay the debt arising under the contract.

## POINT II.

THE GOVERNMENT OF THE UNITED STATES, FOR AND IN BEHALF OF THE CLAIMANTS, AMERICAN CITIZENS, ABOVE NAMED (THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES), ALLEGES, CONTENDS, AND MAINTAINS THAT THE GOVERNMENT OF BOLIVIA, BY AND THROUGH THE CONTRACT OF 1876, DULY, PROPERLY, AND LEGALLY GRANTED TO THE CONCESSIONARIES UNDER THAT CONTRACT, CERTAIN RIGHTS, TITLES, AND INTERESTS IN THE GOVERNMENT ESTACAS LOCATED IN THE BOLIVIAN LITTORAL, WHICH RIGHTS, TITLES, AND INTERESTS WERE IN THE NATURE OF AND CONSTITUTED A CONCESSIONARY GRANT ANALOGOUS TO A LEASEHOLD INTEREST, WHICH CONCESSIONARY GRANT WAS, UNDER THE CONTRACT, TO RUN FOR A TERM OF TWENTY-FIVE YEARS; THAT THE GOVERNMENT OF CHILE, UPON TAKING POSSESSION AND ASSUMING CONTROL OF THE BOLIVIAN LITTORAL, WRONGFULLY INTERFERED WITH AND CONFISCATED IN A MANNER CONTRARY TO THE WELL ESTABLISHED AND UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW CERTAIN OF THESE VESTED RIGHTS, TITLES, AND INTERESTS THUS GRANTED TO THE CONCESSIONAIRES UNDER THE CONTRACT OF 1876; AND THAT FOR THIS WRONGFUL INTERFERENCE, DEPRIVATION, AND CONFISCATION, THE GOVERNMENT OF CHILE IS LIABLE IN TORT TO THE GOVERNMENT OF THE UNITED STATES, FOR AND IN BEHALF OF THE CLAIMANTS, ABOVE NAMED—AS IS CLEARLY AND DISTINCTLY ESTABLISHED BY THE FOLLOWING CONSIDERATIONS, DISCUSSIONS, AND AUTHORITIES.

*Sub-Point A.*

The estacas of instruction had under Bolivian law a due, proper, and legal existence; the Executive of Bolivia was duly, properly, and legally authorized and empowered to grant such rights, titles, and interests as were granted to Wheelwright under the contract of December, 1876, and this conclusion is undisturbed by the Chilean contention regarding "revindication."

*Sub-Point B.*

The rights, titles, and interests in said government estacas, granted by the Bolivian Government to Wheelwright, by and under the contract of December 26, 1876, constitute a concessionary grant analogous and equal to a leasehold for years; but said rights, titles, and interests do not constitute and were not intended to constitute an estate or interest identical with or equivalent to a common law or civil law mortgage, nor to a contract of anticresis either under the code of Chile or under the general principles of the civil law.

*Sub-Point C.*

Under the concessionary grant to Wheelwright of December, 1876, Wheelwright enjoyed in the government estacas for purposes of occupation, possession, and exploitation the rights, titles, and interests which were possessed by the State.

*Sub-Point D.*

Among the rights, titles, and interests in said government estacas which by virtue of this relationship and status Wheelwright enjoyed under this contract, with reference to the government estacas therein granted, were (1) the right to hold said estacas free from the penalty of denouncement for abandonment; and (2) the resulting freedom from the necessity of taking, or remaining in, the physical possession of the estacas chosen and designated by him under his contract.

*Sub-Point E.*

The Government of Chile violated and confiscated these fundamental and all important rights, titles, and interests of Wheelwright under his contract, by applying to Wheelwright's rights, titles, and interests in said government estacas under and pursuant to his contract, the provisions of the Chilean law, under which law it became necessary for him to expend large sums to avoid the penalty of denouncement and under which law and by the application and enforcement thereof he was deprived (improperly and illegally) of certain rich mines to which he was entitled under his contract.

*Sub-Point F.*

This application of the provisions of the law of Chile to the private vested rights held, possessed, and enjoyed by Wheelwright in the Government estacas, under his contract, in a way and manner which amounted to and resulted in a deprivation and confiscation of certain of these private vested rights so held, possessed, and enjoyed by Wheelwright under his contract, constituted a violation of well settled and universally recognized principles of international law, for which wrongful acts the Government of Chile is liable to respond to the Government of the United States in damages.

## POINT III.

THE GOVERNMENT OF THE UNITED STATES FOR AND IN BEHALF OF THE CLAIMANTS, AMERICAN CITIZENS (THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES), ABOVE NAMED, ALLEGES, CONTENTS, AND MAINTAINS THAT THE WHEELWRIGHT CONTRACT OF DECEMBER 26, 1876, RECOGNIZES AND IMPOSES THE OBLIGATION TO PAY 835,000 BOLIVIANOS WITH INTEREST AT THE RATE OF FIVE PER CENT FROM THE DATE OF THE CONTRACT UNTIL SAID SUM WAS DUE, WITH INTEREST THEREAFTER AT THE LEGAL RATE UPON SAID PRINCIPAL AND INTEREST; AND THAT THE GOVERNMENT OF CHILE IS LIABLE UNDER A DIRECT OBLIGATION, QUASI AND EXPRESS, FOR THE AMOUNT DUE TO THE CONCESSIONARIES UNDER THE CONTRACT OF 1876, INCLUDING INTEREST AT THE RATE AND UPON THE AMOUNTS INDICATED ABOVE, FOR THE FOLLOWING REASONS AND UNDER THE FOLLOWING SPECIFIC PROMISES AND UNDERTAKINGS:

*Sub-Point A.*

The Government of Chile is liable for such indebtedness because it deliberately and with knowledge appropriated the funds already specifically set apart and appropriated to the payment of this obligation.

*Sub-Point B.*

The Government of Chile is liable for such indebtedness because of repeated solemn undertakings made to the Government of Bolivia to pay such indebtedness, the Government of the United States for and in behalf of the claimants having the rights of a beneficiary under these formal and solemn undertakings.

*Sub-Point C.*

The Government of Chile is liable for such indebtedness to the Government of the United States because of many solemn diplomatic undertakings and agreements made and repeatedly renewed by the Government of Chile directly to the Government of the United States, and based upon ample considerations.

## POINT IV.

THE CLAIMANTS IN THIS CASE HAVE SUFFERED, BY REASON OF THE VIOLATION BY THE GOVERNMENT OF CHILE THE RIGHTS VESTED UNDER AND BY VIRTUE OF THE CONTRACT OF DECEMBER 26, 1876, NEGOTIATED AND CONCLUDED BY AND BETWEEN THE GOVERNMENT OF BOLIVIA ON THE ONE SIDE AND JOHN WHEELWRIGHT ON

THE OTHER, DAMAGES IN THE AMOUNTS HEREINAFTER SET FORTH, SAID DAMAGES ARISING FROM AND HAVING THEIR ORIGIN IN BOTH TORT AND CONTRACT, AND HAVE ALSO SUFFERED THE LOSS, PRINCIPAL AND INTEREST, OF THE DEBT RECOGNIZED AS DUE AND PAYABLE UNDER THE CONTRACT, UPON BOTH OF WHICH ACCOUNTS (TORT AND CONTRACT), AND FOR THE AMOUNTS HEREIN NAMED AND SET FORTH, THE CLAIMANTS PRAY JUDGMENT.

*Sub-Point A.*

Damages are due to the concessionaries in this case by reason of the failure, on the part of the Government of Chile, properly to recognize, observe, and enforce the rights, titles, and interests possessed by the concessionaries in the government estacas located in the Bolivian Littoral, upon and subsequent to the assumption of possession and control of this Littoral by the Chilean Government. These damages are divisible as follows:

A<sup>1</sup> Damages arising from the failure of the courts of the Government of Chile to adjudge to Wheelwright the possession and enjoyment of certain government estacas to which he was entitled under the Bolivian laws.

A<sup>2</sup> Damages arising from the wrongful application by the Chilean courts and officials to the government estacas held by the concessionaries under their contract of those provisions of the Chilean mining law which related to and governed the denouncement of mines for abandonment.

A<sup>3</sup> Damages arising by way of disbursements for expenses of litigation made necessary by reason of the improper application to the government estacas of various provisions of the Chilean mining law (said expenses including court fees, witness fees, and attorney's fees), as well as for necessary increase of working staff in order adequately to protect the interests of the concessionaries.

*Sub-Point B.*

Damages are due to the concessionaries in this case upon the contract debt which was recognized by the Wheelwright contract as due to the concessionaries.

CONTRACT BETWEEN THE GOVERNMENT OF BOLIVIA AND JOHN  
WHEELWRIGHT, PARTNER AND REPRESENTATIVE OF ALSOP AND  
COMPANY.

The contract of December 26, 1876, negotiated and concluded by and between John Wheelwright, representing Alsop & Co., and Manuel I. Salvatierra, representing the Government of Bolivia, upon which contract rest and from which contract flow the rights, titles, and interests claimed by the Government of the United States for and in behalf of the claimants, reads in words and figures as follows:

Settlement executed between the Minister of Finance and Industry, Doctor Manuel Ignacio Salvatierra, in representation of the National interests, and John Wheelwright, partner and representative of Messrs. Alsop and Company of Valparaiso, for the consolidation and amortization of the credits which he has pending against the State.

In the City of La Paz of Ayacucho, at eleven o'clock of the 26th of December, 1876, before me citizen Patricio Barrera, Notary of Finance, Government and War, and the undersigned witnesses, there appeared, on the one part, Doctor Manuel Ignacio Salvatierra, Minister of Finance and Industry, as representative of the National interests, native of the City of Santa Cruz, resident in this capital, married, and of the legal profession; and of the other part, John Wheelwright, partner and representative of Messrs. Alsop and Company of Valparaiso, Republic of Chili, a native of the United States of North America, a merchant, also married, and transitorily in this City, both being of full age and competent to execute this deed, and whom I certify that I know, and they stated, that in order to consolidate and liquidate the credits pending against the State, arising out of the transfer of the rights which were recognized in favor of Don Pedro Lopez Gama, a Supreme Decree has been issued, dated on the 24th of the present month, in which is embodied the definite settlement for which this deed is ordered to be drawn out, and which is as follows:



*“Resolution of December 24, 1876.*

“MINISTRY OF FINANCE AND INDUSTRY,

*“La Paz, December 24, 1876.*

“In view of a proposition made by Mr. John Wheelwright, a member and representative of the firm of Alsop and Company of Valparaiso, in liquidation, for the purpose of providing for the consolidation and payment of its claims against the Government by an assignment of the rights which were acknowledged in favor of Pedro Lopez Gamia, a new compromise has been concluded in a cabinet meeting with Mr. Wheelwright which finally terminates this matter. It is drawn up in the following terms:

“First: The sum of 835,000 bolivianos is acknowledged as due the aforesaid representative of the firm of Alsop and Company, together with interest at the rate of 5 per cent per annum, not addable to the principal, and to be reckoned from the date on which this contract is duly executed.

“Second. The said principal and interest shall be amortized by means of drafts all of which are to be drawn in quarterly installments on the surplus which, from the date on which the present customs contract with Peru terminates, shall arise from the quota due Bolivia in the collection of duties in the Northern Custom House, over and above the 405,000 bolivianos which the Peruvian government now pays,—whether the customs treaty with that Republic is renewed or whether the National Custom House is reestablished.

“Third. All of the silver mines of the government in the department along the coast are hereby devoted to the payment of the said amortization for which purpose 40 per cent of the net profit shall be utilized, except in the mine known as ‘Flor del Desierto,’ concerning which provision is made in the ensuing article.

“Fourth. The aforesaid mine called ‘Flor del Desierto,’ together with one other of the government mines to be selected by the party concerned, are hereby devoted to the payment of the interest claimed as due, amounting to 170,700 bolivianos prior to December 18, 1875, and 70,000 bolivianos for the year now expiring. In the mine called ‘Flor del Desierto’ the quota due the Government and applicable to the payment of this amortization shall be 50 per cent of the net proceeds, and in the other mine it shall be 40 per cent, as in the remaining mines granted. The surplus remaining after the payment of this interest shall be applicable to the amortization of the capital acknowledged as due, as provided in

clause 3, it being a condition that if one or both of the concessions produce nothing or little, then this obligation and every claim to said interest due shall be finally canceled.

"Fifth. The operation of the mines of the Government let as concessions in the foregoing articles shall be subject to the contract concluded this date on the subject, the interested party being permitted to assign these rights and this compromise to such persons or companies as he may deem suitable, giving notice thereof to the Government.

"Sixth. In all cases in which sums of money are paid or received the Chilean peso or the Peruvian sol of stamped silver shall be considered equivalent to the boliviano, either in this contract or in that regarding the mining concessions.

"Let the proper document be executed, inserting therein this compromise and the contract connected therewith which is mentioned above. Let this be recorded.

[L. s.]

"DAZA.

"OBLITAS.

"CARPIO.

"VILLEGAS.

"SALVATIERRA."

"ACCEPTANCE.

"On the 26th of the current month, at eleven o'clock, I made known this supreme decree which precedes, to Mr. John Wheelwright, representative partner of Messrs. Alsop and Company, who, fully informed of its contents, accepted the contract in legal form, before me, of which

"I hereby certify.

"(Signed.)

JOHN WHEELWRIGHT.

"PATRICIO BARRERA,

"Notary of Finance, Government and War.

"Resolution of December 23, 1876.

"MINISTRY OF FINANCE AND INDUSTRY.

"La Paz, December 23, 1876.

"In accordance with the compromise made this day it has been agreed by the Government in Cabinet Council with Mr. John Wheelwright, representative of the firm of Alsop and Company, that the operation of the Government mines which have been let out as a concession to said firm on the same date shall be subject to the following clauses and conditions:

“ 1. Mr. John Wheelwright shall have a period of three years within which to examine the Government silver mines and find the necessary capital with which to put them into operation, it being his duty to take the necessary preliminary measures to this end as soon as possible. The mines shall remain at the disposal of the concessionary during these three years, and the Government shall enable it to gain actual possession thereof by giving the proper instructions to the authorities.

“ 2. By virtue of the concession which has been made to him the concessionary shall be entitled to organize joint stock companies for the operation of one or more claims, either on the coast or abroad; or else to conclude contracts with the owners of adjacent mines in order to secure the most certain means of operating all or any of the said concessions which in the opinion of the concessionary or companies organized are profitable or will at least pay the cost of working them where veins are already discovered or may be discovered during the three years assigned in the first clause.

“ 3. The concessionaries may hire and employ in their mining work either foreign or native engineers, employees, or laborers, who shall, during the period for which they are hired, be exempt from all military service as well as every civil or municipal office, except in cases of necessity in order to preserve public order and peace.

“ 4. The concessionary or companies in charge of the work shall present semi-annual balances, on the strength of which, together with the records of the books, the distribution shall be made of the net proceeds, 40 per cent being applied by the Government to the paying off of the debt according to the terms agreed upon in the compromise of this date, and sixty per cent going to the petitioner.

“ 5. The Government shall appoint one or more agents to superintend the work performed, who shall be compensated out of the common funds of the enterprise.

“ 6. This contract shall last for 25 years, after which time, if there is any residue after paying off the Government's debt in accordance with the compromise, it shall be turned over to the Government.

“ 7. If, within the first three years or thereafter until the expiration of the 25 years mentioned in the foregoing article, any persons or companies should offer to operate one or more of the mines included in this contract, they may do so provided the present concessionary does not care to undertake the operation thereof and so

states in writing to the Government, or else deliberately neglects to make such statement.

"8. The Supreme Government shall grant to the petitioner free of charge, during the continuance of this contract, such lands of the Government as may be necessary for the erection of his buildings and mining establishments. Let this be recorded.

" DAZA.

" OBLITAS.

" CARPIO.

" VILLEGAS.

" SALVATIERRA.

"ACCEPTANCE.

"On the 26th of the present month, at eleven o'clock, I made known the Supreme Decree which precedes to Mr. John Wheelwright, partner and representative of Messrs. Alsop and Company, who, being notified of its purport, accepted it in legal form, of which I certify.

"(Signed.) JOHN WHEELWRIGHT.

"PATRICIO BARRERA,

*"Notary of Finance, Government and War.*

"CONTINUATION.

"In conformity with which, ratifying respectively the two Supreme Decrees embodied herein, which, in the original, exist in the archives of the collection under number 410, after being legalized by me, the Notary, in conformity with the present and in the most legal form, they covenant: that they oblige and compromise themselves in the name of those they represent, the party of the second part for himself as partner, to the observance and fulfillment of all and every clause contained in both Supreme Decrees. In witness thereof, they affirmed, sealed and signed before the witnesses who were present, Doctors Manuel Vargas and Benjamin Martinez, residents of this City, single men, both lawyers and of full age, before whom this was read from beginning to end, no objection of any kind being made to the tenor of it, and of which I give faith by signing.

"(Signed.) MANUEL I. SALVATIERRA,

" JOHN WHEELWRIGHT,

" MANUEL VARGAS,

" BENJAMIN MARTINEZ."<sup>a</sup>

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<sup>a</sup> For Spanish text, see I Appendix, p. 4.

## POINT I.

THE GOVERNMENT OF THE UNITED STATES, FOR AND IN BEHALF OF MR. JOHN WHEELWRIGHT, MR. GEORGE FREDERICK HOPPIN, MR. HENRY W. ALSOP, MR. JOSEPH W. ALSOP, MR. EDWARD McCALL, MR. GEORGE G. HOBSON, MR. GEORGE J. FOSTER, MR. THEODORE W. RILEY, MR. HENRY CHAUNCEY, AND MR. HENRY S. PREVOST, AMERICAN CITIZENS (THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES), FORMERLY DOING BUSINESS IN CHILE UNDER THE FIRM NAME OF ALSOP AND COMPANY, ALLEGES, CONTENTS, AND MAINTAINS THAT THE CONTRACT OF 1876 MADE BY AND BETWEEN JOHN WHEELWRIGHT, AS LIQUIDATOR FOR ALSOP AND COMPANY, AND THE GOVERNMENT OF BOLIVIA (THE OBLIGATIONS OF WHICH CONTRACT HAVE SINCE ACCRUED AGAINST AND BEEN ASSUMED BY THE GOVERNMENT OF CHILE) IS A VALID AND LEGAL INSTRUMENT, NEGOTIATED AND CONCLUDED IN ACCORDANCE WITH BOLIVIAN LAW, AS PROVED BY THE FOLLOWING FACTS AND CIRCUMSTANCES:

### *Sub-Point A.*

The contract was duly and properly negotiated and concluded by officers of the Bolivian Government having authority to make such contract.

### *Prefatory Summary.*

It will be observed, from the discussion which follows, that this question involves two points,—

(1) The authority of the Bolivian Executive to deal with and make contracts concerning the disposition or operation of the government estacas; and

(2) The power to adjust and to provide for the payment of obligations running from the State to foreigners.

Considering these points in their order:—

(1) An Act dated October 19, 1871, passed by the National Constituent Assembly of Bolivia authorized the Executive to “celebrate contracts of *renting and working in partnership all the mines* (estacas minas) *belonging to the state* in the mineral districts of the republic.” Acting under and in accordance with the

provisions of this law the Bolivian Executive issued certain supplemental decrees dated November 2, 1871, and March 7, May 29, and September 19, 1872. Pursuant to the terms of these various decrees and the law upon which they were based, the Government of Bolivia made with Pedro Lopez Gama, under date of April 1, 1873, a public contract leasing the mines of the littoral to Gama, under an arrangement which provided that fifty per cent of the net proceeds of the operation of the mines should go to Gama and the other fifty per cent should go to Bolivia. This contract was, as a matter of law, an exact counterpart of the Wheelwright contract. The courts of Chile have recognized that the Wheelwright contract was made under the authority of the same laws and decrees and that it was a valid, legal and binding contract.

(2) A law dated November 22, 1872, authorized the Executive to arrange claims actually pending against the State. Operating under this law an arrangement was made with Wheelwright under date of February 7, 1876, and it must be considered that the same law applied to the arrangement of December of the same year. That this law authorized the Executive to make such contracts has not only been conceded but insisted upon by the Chilean Government in connection with the difficulties arising between itself and the Government of Bolivia regarding the Antofagasta Nitrate and Railway Company.

#### *Discussion.*

It would seem that, in the light of all the facts and circumstances surrounding this case and considering the express authorizations which, as hereinafter set forth, were, as to these matters, at various times extended to and conferred upon the executive branch of the Bolivian Government, it cannot be successfully maintained that at the time the documents relied upon in this case were drawn up, the Bolivian Executive did not have the complete power and authority to arrange, negotiate, and conclude with John Wheelwright, the decrees of December 23rd and December 24th, 1876, and the contract of December 26th, 1876, which incorporated such decrees as part of a notarial instrument.

It will at first sight be obvious that the negotiation and conclusion of the contract of December 26th, 1876 (embodying the

decrees of December 23rd and December 24th) involved the exercise by the Executive of two distinct powers: First,—the power to deal with and contract concerning the disposition or operation of the government estacas; and, second, the power to adjust and to provide for the payment of obligations running from the State to foreigners.

Considering these powers in their order: .

*First—The power to deal with and to contract concerning the disposition or operation of the government estacas:*

On the 19th of October, 1871, the National Constituent Assembly of Bolivia passed a law which contained, upon this point, the following stipulations:

“Sole Article.—Let the Executive be authorized, under the obligation of reporting to the next Assembly, for the following objects:

\* \* \* \* \*

“Fifth.—*To celebrate contracts of renting or working in partnership all the mines (Estacas Minas) belonging to the State, in the mineral districts of the Republic.*”<sup>a</sup>

While the wording of this statute,—“Let the Executive be authorized, under the obligation of reporting to the next Assembly”,—might perhaps suggest that its operation was limited to the time between its enactment and the meeting of, or at least the report to, the next Assembly, an examination of the actual facts makes it clear that the Bolivian authorities considered it in force and operated under it for a number of years following the date of its enactment.

It appears from the proceedings before the court of first instance at Antofagasta in the suit brought by John Wheelwright to recover possession of the mine *Justicia*, one of the government estacas, to the possession of which he claimed he was entitled under his contract, that at various times and continuously from the date of the statute down to the date of the contract with Wheelwright, the officials of Bolivia considered the law as binding and effective and that indeed, acting under its authority, they had at an earlier date made, with Pedro Lopez Gama, a special contract for the working of these government estacas. Upon this point, Mr. Wheelwright, the plaintiff in the case of the *Justicia*, made the following statement:

“The Government proceeded to it, perfectly authorized by laws of the country, amongst which figures that of the 19th October, 1871, which authorized the Executive to let, or work in partnership, all

<sup>a</sup> I Appendix, p. 297.

the estacas of the State. In conformity therewith, the decrees of the 2d November, 1871, and 7th March, 29th May and 19th September, 1872, were dictated, by which offers were invited for the working of them, and, afterwards, on the 1st April, 1873, the tenders made by Mr. Pedro Lopez Gama were accepted, and later on, in 1876, the Contract with the plaintiff was celebrated." <sup>a</sup>

A perusal of the decrees referred to by Mr. Wheelwright makes it entirely clear that the Executive of Bolivia did consider this statute as in force and as authorizing him to act thereunder, certainly down to and including the instrument of April 1st, 1873, under which Mr. Gama claimed his rights.

To examine these decrees in some detail:

The decree of November 2, 1871, provides as follows:

"I, Augustin Morales, Provisional President of the Republic, etc., considering that the State should derive every benefit from the estacas mines which it holds as its property in every vein that is being worked; that the Government is bound to fulfill the law of the 19th of October last which authorized it to rent or exploit in partnership all the estacas mines belonging to the State:

"Decree

#### "ARTICLE I

"That a tender is invited for the working of the estaca mines of the State in partnership, the State being considered as an industrial partner;

\* \* \* \* \*

#### "ARTICLE III

"That the Government as an industrial partner does not bind itself to reimburse losses to the partners who furnish the capital;

\* \* \* \* \*

#### "ARTICLE VII

"The company shall be organized in accordance with the provisions of the laws of the country, and the work shall be subject to the Code of Mines, it being understood that the State, because of the part it takes as a partner, does not waive the privilege which it enjoys in mining matters.

"The Minister of Hacienda and Industry shall be charged with the execution and fulfillment of this Decree.

"Done at the illustrious and heroic capital of Sucre November 2, 1871." <sup>b</sup>

By the decrees of March 7 and May 29, 1872,<sup>c</sup> the tender called for by the decree of November 2, 1871, was extended until the first of October, 1872.

<sup>a</sup> II Appendix, p. 108.

<sup>b</sup> I Appendix, p. 299.

<sup>c</sup> I Appendix, p. 301.



The decree of September 19th, 1872, provided as follows:

"I, Augustin Morales, Constitutional President of the Republic, etc.,

"Considering:

"That by unforeseen obstacles and the latest political events, the Engineer of the State has not been able to carry out the examination and measurement of the Estacas mines in the State of Caracoles;

"That it is necessary to give greater scope to the contracts for the working of the said Estacas, and request tenders not only from national managers, but also from foreign ones;

"That the first of October is drawing near which was recently designated for the submission of tenders concerning said Estacas, and the Government has received from different parts complaints by interested parties on account of the shortness of the time,

#### "DECREE;

"ARTICLE 1. A new tender is asked for the working of the Estacas mines of silver of the State of Littoral in association with it in the sense that the State shall be considered as an industrial partner.

"ARTICLE 2. The proposals shall be presented in a package sealed until the first day of April, 1873, on which day, at 12 o'clock, they shall be opened at a Cabinet meeting and in the presence of the Government Attorney, and they shall be classified so that the most advantageous one shall be accepted.

"ARTICLE 3. The Government, as an industrial partner, shall not be obliged to reimburse losses to the partners who furnish capital.

"ARTICLE 4. The duration of the association shall be fixed in the contract, and during the time that may be stipulated the State shall not be able to sell the Estacas involved.

"ARTICLE 5. The partners furnishing capital shall make in their proposals an offer in advance on the net proceeds which the State is to receive. The sum advanced shall be considered as a deposit being the guarantee of the immediate commencement of the work and for every charge that might result from the fault of the managers; and its payment shall be made by an amortization of 6 per cent., to be deducted from the net proceeds.

"ARTICLE 7. The partnership shall be organized in accordance with the provisions of the national laws, and the working shall be effected in conformity with the mining code, it being understood that the State, by reason of its participation, does not renounce the privileges which it enjoys in mining matters.

"ARTICLE 8. The Decree of November 2, 1871, is repealed.

"ARTICLE 9. The Government recommends to the Prefects and Sub-Prefects that they take the most efficacious measures to safeguard the Estacas of the nation, avoiding usurpation and trespass on the part of the miners.

"ARTICLE 10. For the working of the Estacas in the mineral districts of the interior departments the Government shall again call for tenders.

*"Done at the City of La Paz, September 19th, 1872.*

"AUGUSTIN MORALES.

"Countersigned:

"Minister of Government and Foreign Relations, in charge of the Office of the Treasury.<sup>a</sup>

"CASIMIRO CORRAL."

Under the terms of the concession of April 1st, 1873 (referred to by Mr. Wheelwright in his brief before the Chilean Court), between Gama and the Government of Bolivia, negotiated and concluded under the above law and decrees, Gama was to work the government estacas and was to take as a recompense therefor 50 per cent of the net proceeds resulting from such operation, the remaining 50 per cent being, under this contract, turned over to Bolivia.<sup>a</sup> Of this latter amount, one-fourth was to be applied by the Government of Bolivia to the indebtedness recognized in favor of Gama by the contract of December, 1872.

Concerning this contract of April 1st, 1873, between Gama and the Bolivian Government, the President of Bolivia, in his message to the Bolivian Congress of 1873, used the following language:—

“Estacas mines of the State in Caracoles.—The first of April an auction was held for the working and the exploitation of these estacas before the Board composed of the President and the members of the Council of State and the Fiscal of the District. Señor Lopez Gama, concessionary, made an advance of 1,250,000 Bolivianos with interest at 8 per cent, the amortization of 6 per cent, the commission of 1 per cent, to be paid out of the proceeds of the exploitation of which the State shall receive one-half of the net proceeds.

“These bases and the details of the contract you will find in the publication which has been made thereof.”<sup>b</sup>

Concerning the transaction to which reference is here made by the President, it should be noted that in the instrument by which Pedro Lopez Gama transferred to Wheelwright his (Gama's) credits against the Government of Bolivia, the various circumstances attending the making of the Gama contract, the nature of the contract, and the circumstances which grew out of it, are narrated as follows:

“For, among other stipulations of this transaction (Decree of Dec. 21, 1872) it was agreed that the sum recognized by the Government of Bolivia as due to Don Pedro Lopez Gama, it would pay to him with twenty-five per cent of the net profits which the State might have in the working of the Estacas mines, the adjudication of which was to be made on the first of April, one thousand eight hundred and seventy-three, as per written instrument made at La Paz de Ayacucho, before the same Notary of the Treasury Don Patricio Barrera, and in which there was adjudged to Don Pedro Lopez Gama or to the anonymous company or companies that he might organize conjointly with the Government, and subject to the stipulations contained in the same instrument, the exploitation of all the Estacas mines belonging to the State, which in the judgment of the Company (Empresa) will meet at least the expenses of working them, in the veins already discovered, or that might thereafter be

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<sup>a</sup> I Appendix, p. 311.

<sup>b</sup> I Appendix, p. 315.

discovered in the Littoral of the Republic, subject to the Mineral Code.'

"Fourth. That among the various stipulations of the transaction contract just mentioned, are those found in articles seventh, eighth and nineteenth, wherein it is covenanted: in the first, that the net profits derived from the working of the Estacas mines shall be equally divided, one-half to each, between the State and Pedro Lopez Gama or such company as may represent his rights; in the second, that from the one-half, or say the fifty per cent of the net profits assigned to the State, there shall be deducted the twenty-five per cent applicable to the amortization of the sum in which the Supreme Government of Bolivia recognized itself indebted to Mr. Pedro Lopez Gama, in the transaction contract of twenty-seventh of December, of one thousand eight hundred and seventy-two, already mentioned; and in the third, that in the unforeseen event of there arising any disagreement between the contracting parties as to the meaning of the convention 'the question shall be decided,' says this article, 'by two arbitrators selected by each party, and should the arbitrators be unable to agree, the two contracting parties shall name a third as umpire, to whose unappealable decision the contracting parties hereto submit from now.'

"Fifth. That the disagreement foreseen in that article having arisen, when the first step was taken to carry into effect the contract in question, which was to take possession of the adjudicated Estacas mines; because the Supreme Government wished to give the fourth estacas in the Caracoles mineral region, whilst Mr. Pedro Lopez Gama claimed the third, which were the auctioned ones which belonged to the State according to law; the foreseen disagreement having arisen, as stated, it became necessary to make use of the arbitration provided for by said article, and for that purpose the submission was constituted by public instrument executed at Sucre on the seventeenth of March, one thousand eight hundred and seventy-four, in accordance with the decree of the Supreme Government of Bolivia, dated the tenth of the same month and year, and in which said Supreme Government named Don José Maria Santibonez as arbitrator and Don Pedro Lopez Gama named Don Fernando Valverde. The arbitration having proceeded legally and in due form, the arbitrators gave their decision in Cochambamba, on the sixteenth of July, one thousand eight hundred and seventy-four and by which they declared: 'That the Estacas Mines contracted for by Don Pedro Lopez Gama and of which possession should be given him by the Supreme Government of Bolivia, in the Caracoles Mineral region, were those registered in accordance with the prescriptions of the law, and those to which pursuant to the same, the public treasury had a right, and that said estacas were: the fourth in the 'Descubridora,' the third in the rest; and in cases of denunciation, the one next to that of the denunciator; and finally, in cases of association, the seventh or the fifth respectively, in conformity with Article one hundred and ninety-nine of the Mineral Code.'

"Sixth. That violating what had been agreed to, not only in article nineteen of the contract for the working of the Estacas mines, but likewise in the very instrument constituting the submission, the Supreme Government of Bolivia did not acquiesce in the resolution of the arbitrators, but appealed from the sentence of the arbitrators to

consult the Court of Cochambamba. An appeal so unusual as well as contrary to what had been covenanted, gave occasion for the protest formulated by Mr. Lopez Gama in the City of Tacna, Republic of Peru, on the twenty-ninth of September, of one thousand eight hundred and seventy-four, before the Notary Don Daniel Fernandez Davila, and to sundry other claims which on that account he presented to the Supreme Government of Bolivia; all of which, unfortunately did not suffice to make said Government desist from its appeal to the Court of Cochambamba, and produced no other result than the transmission of Mr. Lopez Gama's reclamation to the Assembly, which body closed its sessions without taking this matter into consideration, and there is no hope of its so doing, as it does not have to reassemble for two years to come, and that is not sure, inasmuch as political events may indefinitely delay its next meeting.

"Seventh. That not only for reasons easily understood from the aforementioned facts, but likewise because if the Supreme Government of Bolivia were willing now or later on to place Mr. Lopez Gama in possession of the third estacas mines, this tardy compliance with what was covenanted, would not be sufficient to prevent the contract of fourth of April, one thousand eight hundred and seventy-three, from becoming completely nugatory in its effects; inasmuch as the wealth which was contained in the third estacas has been exploited, it would be entirely useless to invest heavy sums in them when loss is certain. In like manner such tardy compliance would not be sufficient to release the Supreme Government of Bolivia from its responsibility for damages and injuries, profits not made and emergent loss experienced by Mr. Lopez Gama in consequence of its failure to comply opportunely with its pact. For these reasons, he says, on the fourth of January of the present year, he addressed to the Supreme Government of Bolivia a long communication, in which he considers said contract of fourth April, one thousand eight hundred and seventy-three, as extinct, because of the failure on the part of the Government to comply with the first of its obligations, claiming payment for the damages and injuries, profits not made and emergent loss incurred by him in consequence thereof; demanding payment of one million eighty-seven thousand five hundred dollars (\$1,087,500) recognized by the Transaction contract of twenty-seventh of December of one thousand eight hundred and seventy-two and interest at eight per cent per year; accompanying the account of what said reclamations amounted to; and making known that his rights to all that has been related, would be made valid and enforced by those to whom it legally appertaineth to do so." <sup>a</sup>

Finally, it should be observed, as to the authority of the Executive to lease the government estacas under this statute, that the courts of Chile have expressly affirmed the binding force and effectiveness of this statute at the date of the Wheelwright con-

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<sup>a</sup>I Appendix, p. 327.

tract. The court of first instance at Antofagasta found, in the suit, already referred to, brought by John Wheelwright to recover possession of the mine *Justicia*, as follows:

“Considering \* \* \*

“22. With respect to the second point, namely, if the Government could celebrate contracts; that by the law of the 19th October, 1871, the Executive was authorized to celebrate contracts of letting or of working in partnership all the estacas-mines belonging to the State in the mineral districts of the Republic, and in conformity therewith, tenders were invited for the working of the said estacas by the decrees of the 2d November, 1871, 7th March, 29th May and 19th September, 1872, the whole concluding with the celebration of the contract with Wheelwright.”<sup>a</sup>

It is thus clear that the Executive of Bolivia and the courts of Chile have recognized that the power delegated to the Executive by the statute was properly delegated and conveyed, and that the Executive acting thereunder was able, properly and legally, to arrange for the exploitation of the government estacas, and specifically it has been held by the courts of Chile that this statute authorized the Bolivian Executive to enter into the Wheelwright contract of 1876.

*Second.—The power of the Bolivian Executive to adjust and to provide for the payment of the obligations of the State to foreigners:—*

Under a law dated November 22, 1872, the National Assembly specifically and definitely authorized the executive branch of the Government to enter into arrangements respecting claims against the State. This law reads as follows:

“ARTICLE 2: The Executive is authorized to enter into settlements about indemnifications and other claims actually pending against the State, whether by natives or foreigners, and to arrange with the interested parties the most convenient form in which their respective obligations will have to be fulfilled; referring these matters, only in case of not coming to an agreement, to the decision of the Supreme Court, with the obligation of reporting to the next Legislature.”<sup>b</sup>

In its resolution of February 7, 1876 (the very year in which the Wheelwright contract was made) the Cabinet Council of Bolivia asserted in express terms, in a document recognizing John Wheelwright as assignee of the rights of Pedro Lopez Gama, that it was

<sup>a</sup> II Appendix, p. 115. While the upper court (Court of Second Instance) overruled the decision of the lower court in this case (the *Justicia*), the upper court does not seem to have disturbed the findings, of which this is one.

<sup>b</sup> II Appendix, p. 274.

operating under the authority conferred upon it by the law of November 22, 1872. The full text of this resolution is as follows:

“MINISTRY OF FINANCE AND INDUSTRY,

*“La Paz, February 7, 1876.*

“Having been considered in a Cabinet Council together with the foregoing statement of the government, the resolution of January 22 last, in which is stated the fact that it was made final by the Government in the exercise of the authority conferred upon it by the law of November 22, 1872, is hereby declared to be still in force in all its parts. Let these documents be transmitted to the Prefect of the Department, in order that he may order the Treasury Notary to make the present proceeding and those connected therewith known to Mr. John Wheelwright, representative of the firm of Alsop & Co. and assignee of the rights of Mr. Lopez Gama, and that the necessary document may be executed. Let notice be taken hereof and let it be published.”<sup>a</sup>

In connection with the discussion of the law of November 22, 1872, and the scope of the powers conferred by it, it is of interest to note that the Government of Chile has expressly taken the position that under this law and in accordance with its terms the Bolivian Executive was not only authorized to negotiate the settlements therein provided, but that such settlements did not need the approval of the Bolivian Congress in order to be binding upon it. This position was taken concerning the settlement made November 27, 1873, by and between the National Executive of the Government of Bolivia and the Antofagasta Nitrate and Railway Company (the attempted imposition of a tax upon which—the tax amounting to a minimum of ten cents\* per quintal on salt-peter exported from Antofagasta—led to the war of 1879–1884, which resulted in the occupation of the Bolivian Littoral by Chile). In a formal note, dated July 2, 1878, the Chilean Chargé, acting under “express instructions to support” the claim of this company, communicated the views of the Government of Chile upon this point as follows:

“On February 14, 1878, the National Constituent Assembly decreed as a minimum a tax of ten cents per quintal on salt petre exported by the Antofagasta Nitrate and Railroad Company and the supreme Government ordered under date of the 23d of said month the execution of that decree which was made public by a circular in the city of Antofagasta.

“The Nitrate Company had considered itself tranquil in its property and its rights acquired after various vicissitudes and disturbances suffered from 1868 until the decree of December 31, 1872, which caused the settlement of November 27, 1873, registered in the Official Annual of the laws of Bolivia of that year, page 185,

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<sup>a</sup> I Appendix, p. 337.

and incorporated in a political agreement. That transaction, reduced to a public instrument in Sucre, November 29, 1873, before the Government Notary Jose Felix Oña, left nothing pending because the Government accepted it by virtue of the authorization conferred upon the executive power by the law of November 22, 1872, inserted at page 220 of the Annual of Laws and Supreme Decrees of that year, article two whereof provides definitely as follows:

“The executive power is authorized to compromise concerning indemnities and other claims at present pending against the state, be they national or foreign, and to agree with the interested parties on the most convenient form in which it will fulfill its respective obligations, referring these matters only in case of disagreement, to the decision of the Supreme Court with the duty of rendering an account to the next Assembly.’

*“The law was explicit; it conferred upon the executive absolute powers, without the necessity of new revisions or applications, except simply to render an account of the action in the cases in which the decision of the Supreme Court should be invoked. Therefore the transaction was immediately reduced to a public instrument and was inserted in the Annual and put into execution without first being submitted to the approval of the Assembly, to which the Minister of Hacienda limited himself to rendering an account of its execution in his official report of 1874. In said report the Minister of Hacienda, referring to the Nitrate Company, stated that there had been settled by adjustment ‘an odious question which, for a long time, had compromised, before public opinion, the integrity of the Government. Its decision held in suspense the fate of great capitals which the investors had expended to establish on a large scale in the desert of Atacama the nitrate industry.’ ”*<sup>a</sup>

It would therefore appear to be clearly and sufficiently established that the Wheelwright contract of 1876 was negotiated on the part of Bolivia by Manuel I. Salvatierra, Minister of Finance and Industry, under and pursuant to decrees made by the Cabinet Council; that the Council in making these decrees operated under the statute of November 22, 1872; that under this statute it must be considered that the Executive entered into contracts in connection with the State obligations under an express grant of power by the legislative body; and that in and by this contract the Executive negotiated and arranged, *inter alia*, the disposition of the government estacas, to deal with which the Executive had an express delegation of authority by the legislative branch of the Government.

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<sup>a</sup> I Appendix, p. 229.

### *Sub-Point B.*

The contract thus legally negotiated and concluded by the executive department of the Bolivian Government was duly and properly ratified and approved by the Bolivian Congress.

### *Prefatory Summary.*

From the documents set forth in the discussion following it will appear that the Minister of Finance and Industry reported to the National Congress of 1877 a detailed statement of the various measures which had been adopted by the Provisional Government under President Daza for the arrangement and liquidation of the obligations of the Bolivian Government, and that among the obligations so discussed in detail was the one running in favor of Wheelwright. Attached to this report was a copy of the executive decrees of December 23rd and 24th, 1876, upon which the Wheelwright contract was based. With this complete report before it for action, the Bolivian Congress, under date of November 23, 1877, passed a law expressing a vote of honor and confidence in the Minister of Finance. Later, under date of February 12, 1878, the Bolivian Congress passed a law which provided in its second article that "the measures adopted in the Ministry of Finance are approved of, with the exception of such as have been expressly derogated or modified by the disposition of the present Assembly." The Wheelwright contract does not appear among those which were disapproved by the National Congress. This vote of ratification by the Bolivian Congress was afterwards recognized by the Chilean court of first instance at Antofagasta in the case of the *Justicia* as being sufficient.

### *Discussion.*

Unlike a number of unratified and unapproved concessions made by the Executive of Bolivia, but which, nevertheless, the Government of the nationals interested in the concessions contended were valid, (for example, the Antofagasta Nitrate and Railway Company, difficulties on account of which, arising under its unratified contract, led to the war of 1879-84 between Chile and Bolivia), the Wheelwright contract of 1876 received the approval of the Bolivian Congress.

In the memoria which the Minister of Finance and Industry presented to the National Congress of 1877 and in which he



discussed with considerable detail the various measures which had been adopted by the Provisional Government under President Daza for the arrangement and liquidation of the obligations of the Bolivian Government, the Minister presented the circumstances connected with the debt due Wheelwright and the arrangement which had been made for the settlement in the following language:

*"First.*

"The Government having perceived from the time of its inauguration its poor financial condition, endeavored to remedy it with certain provisions. Among these the circular of July 6, 1876, (2) which suspended the payment for services preceding the 4th May, and had as an object the establishment of a dividing line which should separate the situation and serve as a point of departure for the operation of the new administration which began with an immense deficit from which it was necessary to free itself.

"The Office of the Secretary General issued, on the 17th of October of the same year, a decree imposing a tax upon copper bars, (3) a resort which, although exacting, was very timely in the penury which was being experienced. It produced the annual income of 15,000 bolivianos in time drafts.

"When the Ministry was installed the question of the existence of the contract with John G. Meiggs concerning the lease of the salt-petre deposits of Toco was pending. Perfected and put into execution as it was, without lawful reason for its rescision, censured only by malcontents who judged from passion alone it was taken up in Cabinet Council after the judicial question had been considered. This promptly reduced the fund of 70,000 soles which were received until December last, a fund which was increased by 3,500 bolivianos the premium obtained on account of the care taken in obtaining the drafts on Lima. Another Treasury increase for the poor state of finances is the suspension which upon the execution of the deed of transfer and separation of the National Bank, I made by an additional agreement, of the premium of 10 per cent which this bank had been charging and desired to continue charging for the drawing of drafts on funds of the State from one of its branches to the other.

"There was likewise obtained, also, in time drafts, the income of the coinage for the four months which ran from the first of December, 1876, to the 31st of March of the present year. It reached the sum of 49,946 bolivianos.

*"Second.*

"This fund was the only one available as was set out in the budget. The others were not available and whatever others might have been raised should have belonged to John Wheelwright, representative of the credit of Lopez Gama, to whom, by the decrees of December 18th 1875, and January 22, 1876, there had been allotted all the revenues which were not pledged in the budget. Besides the contract accepted by these decrees, deprived the Government of 70,000 bolivianos cash from the Treasury of Cobija which had been annually assigned for the payment of the interest upon the debt acknowledged due him. This interest was excessive, having been charged at eight per cent per annum, compoundable.

"With such a contract the Government found itself without funds whereof to dispose for all the ordinary ones had been exhausted and without means of creating any other resources because these were applied before hand to the extinguishment of said debt all the extraordinary revenues or those of a new creation. That contract could not be more burdensome because of the embarrassment and difficulty in which the Government was placed in attending to the necessities of its working and administration.

"It was necessary, in view of a new proposal from Mr. Wheelwright to formulate and agree upon a compromise which should better the conditions of the contract, favoring and lightening the burden of the Treasury and giving to the Government liberty and resources to obtain funds for itself. Thus the compromise of the 24th of December, 1876, was reached whereby there was deducted from the admitted principal the interest which had already been paid and this latter was reduced to 5 per cent, not compoundable, the payment of the principal to be made by drafts upon the excess which might be obtained over the present amount of the proceeds of the custom house of Arica.

"By this means the revenue from the copper bars and nitrates became free because even if these latter were considered by the resolution of the 30th of March of 1876, not to be included in the contract of the 18th of December, 1875, the force of this resolution by the terms of said contract might be disputed."

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"The contract of the national customs house of Arica was opportunely cancelled for the purpose of its termination or its substitution by another. For this latter purpose a Plenipotentiary with proper instructions has gone to Lima. It is to be hoped that in case a renewal of the contract be made, that it will be with an increase proportionate to the great development and increment which our commerce has shown through the ports of Arica and Mollendo, and in accordance with other points of vital interest to the country.

"If this be not so, the auction which the citizens are actually asking, offers many probabilities of profit and advantage for the State; an improvement of this situation being evident in either case.

"True it is, as has been stated in Section 2, that the increase over the actual amount of the proceeds of said custom house is destined to the payment of the debt admitted to be due to Mr. Wheelwright, but if in this there is inhibition which prevents the free employment of that fund, the satisfaction of the fulfilment of a duty and the exemption from a burden from which it was necessary to relieve ourselves, remains."<sup>a</sup>

To this memoria, which contained the above discussion of the Wheelwright obligation, there were appended the actual texts of the decrees of December 23rd and December 24th, 1876. The Bolivian Congress had before it, therefore, in this memoria, all the precise details of the Wheelwright contract, together with the facts and circumstances which attended the making thereof, as well as the reasons which impelled the Government of Bolivia to adopt this method of settlement. With these things thus fully before

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<sup>a</sup> I Appendix, p. 340.

it, the Bolivian Congress, under date of November 20, 1877, passed a law in which it extended a vote of confidence to the Minister of Finance, who, during the previous year, as above set forth, had made the Wheelwright contract of 1876 and who had, as just stated, reported fully thereon to this Congress. The law reads as follows:

[Translation.]

*"Law of November 21.*

"VOTE OF HONOR TO MINISTER SALVATIERRA AFTER THE READING OF HIS MEMORIAL.

"The National Constituent Assembly decrees:

"Single article. In view of the merit displayed in the memorial just read by the Honorable Minister of Finance and Industry, Dr. Manuel Ignacio Salvatierra, he is hereby given a vote of honor and confidence.

"Let this be communicated to the Executive for enforcement.

"Hall of Sessions, La Paz, Nov. 20, 1877.

"MARIANO REYES CARDONA, *president.*

"JORJE DELGADILLO, *deputy secretary.*

"LUCIANO VALLE, *deputy secretary.*

"MINISTRY OF GOVERNMENT AND FOREIGN RELATIONS.

*"La Paz, Nov. 21, 1877.*

"Let it be executed.

"DAZA.

"JOSE M. DEL CARPIO."<sup>a</sup>

It thus seems clear that it must be considered that the Bolivian Congress approved of the action of the Minister of Finance under the Provisional Government of President Daza in negotiating the Wheelwright contract.

The contention of the United States that the Bolivian Congress approved this contract does not, however, rest upon this mere vote of confidence in the Minister of Finance (which, however, the Government of the United States believes would be sufficient to establish the fact of such approval), because this contract was also the subject of definite expression of approval in the law of the Bolivian Congress dated February 12, 1878, on which date the Congress passed a law providing in terms as follows:

*"The National Congress Assembly, after having heard the report of its different Commissions concerning the acts of the Provisional Government, and having debated consequently each matter with subjection to the interior regulation,*

"DECREES.

"SOLE ARTICLE.—The acts of the Provisional Government are approved of in the following form.

"First.—The Constitution of the State being sanctioned, and the bases for the formation of a Regulation of Elections and Munici-

<sup>a</sup> Appendix, p. 342.

palities being dictated, it is declared inofficious to pronounce any decision on the reglamentary decrees of 15th December, 1876, and 30th March, 1877.

"Second.—*The measures adopted in the Ministry of Finance are approved of, with exception of such as have been expressly derogated or modified by disposition of the present Assembly.*

"Third.—In the War Department, the measures of the Government relative to the organization of the army and of the columns of garrisons, the provision of arms, ammunitions and the rest of war utensils, and the promotion and re-establishment of the high class of Generals of the former Chiefs mentioned in the report of the Minister of War, are approved of.

"Fourth.—All the decrees and resolutions dictated by the executive in matter of justice authorizing same to submit to the Supreme Court the proposed modifications for the respective commissions and to formulate consequently the necessary reforms under the condition of rendering account to the next Legislature, are approved of.

"Fifth.—The acts of the Government are approved of concerning ecclesiastical matters, including the suspension of temporalities decreed against the Most Illustrious Archbishop of La Plata for having refused to give concourse of the vacant curacies in the archdiocese.

"Sixth.—The decree of 10th August, 1877, is approved of, which re-establishes the official instruction which is actually given by private institutions.

"Seventh.—The decrees are confirmed which have for their object the introduction of changes in the provisional circumscriptions of the Departments of Cochabamba, Potosi and Tarija.

"Eighth.—The acts are approved of which refer to the branch of industry.

"Communicate to the Executive Power for its performance and fulfilment.

"Hall of Sessions at La Paz, of Ayacucho, this twelfth day of the month of February of 1878.

"(Signed.) A. QUIJANO,

*President.*

"(Signed.) SAMUEL VELASCO FLOR

*Secretary,*

"(Signed.) ABDON S. ONDARZA,

*Deputy Secretary*

"MINISTRY OF GOVERNMENT AND OF FOREIGN AFFAIRS,

*"La Paz, 14th February, 1878.*

"Be it performed.

"(Signed.) H. DAZA.

"(Signed.) J. M. DEL CARPIO."<sup>a</sup>

Inasmuch as the Wheelwright contract does not appear among those which were disapproved by the Congress, it is clear that it must be conclusively considered that this contract had the consent and approval of this branch of the Bolivian Government.

<sup>a</sup> II Appendix, p. 75.

This conclusion is amply and satisfactorily sustained by the finding of the Chilean court of first instance at Antofagasta in the case of the *Justicia* already referred to, in which that court found as follows:

“Considering \* \* \*

“23. That two years afterwards, (that is, after the date of the Wheelwright contract) on the 12th February, 1878, (Fol. 118) the National Assembly approved the measures adopted in the Department of Finance by the provisional government inaugurated on the 14th May, 1876, except those which had been derogated or modified by express disposition thereof, amongst which the contract with Wheelwright does not appear.”<sup>a</sup>

Thus it appears clear that not only was there no congressional action specifically annulling or setting aside the Wheelwright contract of 1876, or derogating from the rights, titles, and interests granted by it, but on the contrary, it must be considered, as indeed was found by one of the Chilean courts, that the contract was formally approved by the legislative branch of the Government of Bolivia; and moreover, from that time to the present, the Government of Bolivia in all of its negotiations with the Government of Chile and in all its correspondence regarding this claim with the United States has ever and always acknowledged the legality of this contract, and in its negotiations and correspondence with the Government of Chile has insisted that that Government should meet the obligations called for by it. There can therefore be no question but that the contract has been duly and properly ratified by the executive and legislative branches of the Bolivian Government.

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<sup>a</sup> II Appendix, p. 116.

### *Sub-Point C.*

The contract so made and ratified has been repeatedly recognized as a valid and binding instrument by the Governments both of Chile and Bolivia.

C<sup>1</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Government of Bolivia in and by a number of executive decrees promulgated for the express and specific purpose of carrying this contract into effect.

### *Prefatory Summary.*

As shown below, the Government of Bolivia repeatedly recognized and approved the legality and binding effect of the Wheelwright contract by a series of executive decrees promulgated for the express and specific purpose of carrying this contract into effect. These decrees were as follows: decree dated January 5, 1877, addressed to the Prefect of the Department of Cobija and signed by the President and the Minister of Finance and Industry; a decree dated May 24, 1877, addressed to the same official and signed by the Minister of Finance and Industry; and other decrees of the same character dated, respectively, March 28, 1878; July 25, 1878; August 9, 1878; August 19, 1878; August 21, 1878; October 30, 1878; December 12, 1878, and finally on February 5, 1879. All of these decrees directed the proper officials to render to Wheelwright all necessary assistance in the matter of securing possession of the government mines in the Littoral under and pursuant to the terms of his contract.

### *Discussion.*

On the 27th of December, 1876, the day following that on which the contract between himself and the Government of Bolivia was finally concluded, John Wheelwright caused to be published in the newspapers of La Paz and Caracoles the following notice:

#### *"Mining Setts of the State on the Coast.*

"I hereby give notice to all who have adjoining properties, or who are in any way interested in the above mentioned mines, that, in virtue of a Supreme Decree of the 23 inst., I am in possession of all

the Mining Setts of Silver belonging to the State in the Coast Department, and consequently that any arrangement which such persons may desire to enter into respecting same should be made with the undersigned, with whom they can communicate by addressing him at Valparaiso, post office box No. 254.

"La Paz, 27th Dec'r, 1876.

"(Signed.) JOHN WHEELWRIGHT." <sup>a</sup>

Nine days later, on January 5, 1877, Manuel I. Salvatierra notified John Wheelwright that the President of Bolivia and himself had addressed the Prefect of the Department of Cobija in the following words:

"The Government, by the contracts of the 23d and 24th December last, which are registered in No. 691 of the 'Reforma,' has adjudicated to Mr. Wheelwright, the representative of Messrs. Alsop & Co., of Valparaiso, in liquidation; all the mining Setts, Estacas Mines of Silver belonging to the State, situated in the Coast Department.

"In order that this adjudication may be duly carried into effect, you will please render Mr. Wheelwright all the aid dependent on your authority, and you will arrange: That the Sub Prefects and other functionaries under your jurisdiction may, within their sphere, render Mr. Wheelwright such aid that he may be put in peaceful possession of the said Mining Setts.

"Due compliance with this disposition is expected from your patriotism.

"May God be with you.

"(Signed.) H. DAZA,  
"M. I. SALVATIERRA." <sup>a</sup>

On May 24, 1877, the Minister of Finance again directed the Prefect of the Department of Cobija as follows:

"MINISTRY OF FINANCE AND INDUSTRY."

"No. 58.)

"La Paz, 24th May, 1877.

"To the Prefect of the Department of Cobija.

"SIR: Notwithstanding that orders have been given to your Prefecture to facilitate the taking possession of the Mining Setts (Estacas Minas) of the State by Mr. John Wheelwright to whom they were adjudicated, these orders are now repeated with the same object, in order that, by all the legal and judicious measures in your power, you may overcome all difficulties and remove every obstacle, either personally or by means of the Sub-Prefects and other functionaries who are competent to intervene in the matter.

"The strict fulfilment of this order is expected from your zeal and patriotism.

"May God be with you.

"(Signed.) MANUEL I. SALVATIERRA.

"The foregoing is correct.

"(Signed.) MANUEL PENAFIEL." <sup>b</sup>

<sup>a</sup> II Appendix, p. 143.

<sup>b</sup> II Appendix, p. 144.

Similar notices were issued under dates of March 28, 1878, July 25th, 1878, and August 9th, 1878.<sup>a</sup> On August 19th, 1878, the authorities of the Department of Caracoles instructed the proper official to notify the representative of Wheelwright—

“of all the operations of measurement, possession, and examination which may be performed by this Deputation.

“It is also ordered that in all the minutes of possession, a clause be inserted, expressing the inviolability of the fiscal property in the event of its being encroached upon by intruders.”<sup>b</sup>

Under date of August 21, 1878, the Minister of Finance and Industry issued a decree in which it was stated that—

“In virtue of the reasons on which this petition is founded, and considering that *Mr. Wheelwright took over the Fiscal Mining Setts (Estacas Minas Fiscales), under the Contracts of the Settlement of the 24th December, 1876, as the representative of the State*, it is hereby declared that as such he should enjoy the same privileges as the State in the judicial measures which he may initiate and sustain in order to enter into and maintain possession of the said Fiscal Mining Setts.”<sup>c</sup>

Under date of October 30, 1878, the Bolivian Executive ordered that the Prefect of the Department of Cobija—

“having assured himself that, as stated in this petition, the subaltern functionaries oppose its execution, let them be proceeded against by law, and let others be named to replace them, subject to the approval of the Supreme Government.”<sup>c</sup>

On December 12, 1878, the President directed the Prefect of the Department of Cobija to see to it that, whenever discoveries of minerals were made in his Department, the government mining setts were marked off, with the further direction that Wheelwright should be notified.<sup>c</sup>

Finally on February 5, 1879 (within four days of the seizure of Antofagasta by the Chilean forces), the President of Bolivia caused to be issued the following order:

“MINISTRY OF JUSTICE,  
“PUBLIC INSTRUCTION AND WORSHIP,  
“La Paz, 5th February, 1879.

“*To the Fiscal of the Coast District.*

“SIR: Repeated demands having been made to the Government on the part of *Mr. Wheelwright, who, in association with the State, is working the Fiscal Mining Setts (Estacas Minas Fiscales) of your district*, in order to render effective his action as administrator of the Society, which he is in virtue of his contract, the President of the Republic charges me to request you to forward to the Fiscal Ministry the following instructions:

“First.—That the Fiscal of the District of Caracoles, who, according to law, represents the rights of the State, should put in force the

<sup>a</sup> II Appendix, pp. 145–146. <sup>b</sup> II Appendix, p. 146. <sup>c</sup> II Appendix, p. 147.



legal measures which the contractor may deduce, seeing that he is not guided by private interests, but as a partner with the Government, in place of putting obstacles in the way, as would seem to be the case from the evidence which accompanies one of his claims.

"Second.—That as, according to Article 168, Clause 2, of the Mining Code, the neighbor can have free entrance to a mine when he presumes or fears some prejudice, the contractor, Mr. Wheelwright, cannot be refused the right of investigating personally, or by means of his agent, the encroachment of the neighbor on the bounds of the Fiscal Mine, in order to formulate the corresponding demand before the competent authority in the event of his fears being realized; while, on the other hand, this right of procedure, merely administrative, cannot be restrained by any opposition whatsoever.

"Third.—In the event of any well-founded dispute arising, information of the matter shall be passed to the competent judge in the form prescribed, amongst other depositions, by the law of 10th November, 1873.

"As will be observed, the Government, in the foregoing instructions, does not make any new resolution, but only calls to remembrance the legal dispositions mentioned, in order that they may have the most faithful and strict fulfilment.

"May God be with you.

"(Signed.)

DAZA.

"(Signed.)

SERPÍO REYES ORTIZ.

"Given at the request of the party interested, Mr. José Santos Monroí, as representative of Mr. Wheelwright.

"(Signed.)

MELQUIADES LOAIZA,

[SEAL.]

"*Chief of the Section of Justice.*"<sup>a</sup>

It will thus be noted that from the time when the contract was granted up until almost the very hour of the occupation of the Littoral by the invading forces of Chile, the Executive of Bolivia recognized the validity and binding effect of the contract of December, 1876, and rendered to Wheelwright, so far as it was able, all necessary assistance in order to enable him, pursuant to the terms of his contract, to take possession of the property, the Estacas de Instrucción in the Bolivian Littoral.

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<sup>a</sup> II Appendix, p. 148.

### *Sub-Point C.*

**C<sup>2</sup> The validity and binding effect of this contract have been recognized and approved by the Government of Bolivia as well as by the Government of Chile in the diplomatic correspondence passing between those two Governments.**

### *Prefatory Summary.*

While but little of the correspondence passing between the Governments of Bolivia and Chile upon this subject, has been at the disposal of the Government of the United States in connection with the preparation of this case, there is certain correspondence to which access has been had which shows that in such correspondence the two Governments have recognized the Wheelwright contract as a legal, valid, and existing obligation. This correspondence is set forth in the note dated La Paz, August 13, 1900, written by Señor Abraham König (Minister of the Republic of Chile, accredited to the Government at La Paz) to the Bolivian Minister of Foreign Relations.

### *Discussion.*

For the obvious reason that the diplomatic correspondence passing between the Governments of Bolivia and Chile has not been accessible to the Government of the United States, it is possible for the latter to reproduce but little going to show that in such diplomatic correspondence between those two Governments they have recognized the validity and binding effect of the Wheelwright contract. However, the little correspondence that has been at the disposal of the Government of the United States in the preparation of this case recognizes in clear and unmistakable terms the legality and binding effect of the Wheelwright contract and the obligations which it imposes.

In a note dated La Paz, August 13, 1900, written by Señor Abraham König, the Minister of the Republic of Chile accredited to the Government at La Paz, Señor König, in suggesting to the Bolivian Government a basis for the settlement of the pending

difficulties between the two Governments, made the following proposal:

"In compliance with the instructions from my Government, and starting from the antecedent accepted by both countries, that the old Bolivian littoral is and shall always remain Chilean, I had the honor to submit to Your Excellency the following bases for a Treaty of Peace and Amity:

"The Government of Chile will be disposed, in order to conclude the Treaty of Peace with Bolivia, to grant, in exchange for the definite cession of the Bolivian littoral we now occupy by virtue of the Pact of Truce, the following compensations:

"(a) *To take upon themselves, and to bind themselves to the payment of the obligations contracted by the Bolivian Government with the mining enterprises of Huanchaca, Corocoro, and Oruru, and the balance of the Bolivian loan contracted in Chile in 1867, after deducting such amounts which have been credited said account, according to Art. 6 of the Treaty of Truce.*

"*Chile could also, in the same manner, pay the following liabilities affecting the Bolivian littoral: The one corresponding to the bonds issued for the construction of the railway from Mejillones to Caracoles; the liability in favor of Mr. Pedro Lopez Gama, at the present time represented by the house of Alsop & Co., of Valparaiso; that of Mr. Enrique Meiggs, represented by Eduardo Squire, resulting from the contract the former made with the Government of Bolivia on May 20, 1876, for the lease of the fiscal nitrate beds of Toco, and the one recognized in favor of the family of Mr. Juan Garday. These liabilities will be the object of a particular liquidation and of a detailed specification in a supplementary protocol.*"<sup>a</sup>

Later, in the same communication, Señor König makes the following statement concerning the attitude of Bolivia upon this question as expressed in a communication from the Bolivian Minister of Foreign Relations to himself:

"Several days after this, and as the natural result of the conferences, Your Excellency communicated to me the propositions agreed to by the Government, which are the following:

"*The Government of Chile takes upon themselves the obligations contracted by Bolivia with the mining enterprises of Huanchaca, Corocoro and Oruru, and the balance of the Bolivian loan contracted in Chile in 1867. They will also take upon themselves the following liabilities which burden the Bolivian littoral: The one corresponding to the bonds issued for the construction of the railway from Mejillones to Caracoles; the liability in favor of Mr. Pedro Lopez Gama; that of Mr. Enrique Meiggs, resulting from the contract made with Bolivia in 1876 for the lease of the fiscal nitrate beds of Toco, and the one recognized in favor of the family of Mr. Juan Garday.*"<sup>b</sup>

It is well to observe in this connection that the Ministry of Foreign Relations of Chile in its circular note to the Chilean

<sup>a</sup> II Appendix, p. 471.

<sup>b</sup> II Appendix, p. 472.

Diplomatic Corps under date of September 30, 1900, in speaking of this letter of Señor König, used the following language:

*"Our Plenipotentiary Minister in La Paz addressed to the Bolivian Foreign Office his above mentioned communication of August 13, 1900, in obedience to those instructions which express this Government's unalterable policy, a policy which it will consistently maintain until the solution of the problem is reached, a policy resulting from the painful experience of seventeen years, and from the rooted conviction that to deviate from it is tantamount to abandoning the only way that leads to a complete settlement."*<sup>a</sup>

It thus appears that in an authorized correspondence and negotiation between the duly accredited representatives of the Governments of Chile and Bolivia the legality of the Wheelwright contract as well as the obligation imposed thereby was distinctly and definitely recognized by both Governments.

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<sup>a</sup> II Appendix, p. 529.

### *Sub-Point C.*

C<sup>3</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Government of Bolivia in its diplomatic correspondence with the Government of the United States.

### *Prefatory Summary.*

The correspondence set forth in the discussion under this point shows that on July 31, 1906, the American Minister at La Paz requested the Bolivian Minister of Foreign Relations to supply him with certain documents relative to the antecedents of the Alsop case, at the same time setting forth that the Government of Bolivia would not be relieved from responsibility until the original liability upon this contract was fully met; that on September 21, 1906, the Minister replied stating that the Government of Bolivia considered that the Government of Chile was exclusively liable for the payment of this obligation; that under date of October 6, 1906, the Minister of Foreign Relations forwarded to the American Minister copies of the antecedents which had been requested; that on July 16, 1907, the American Minister reported that Bolivia repeated its contention that the Government of Chile was liable for this obligation; that on July 22, 1907, the American Minister reported that the Minister of Foreign Relations for Bolivia had instructed the Bolivian Minister at Santiago to take up with Chile the subject of the settlement of the claim; and that finally, on September 10, 1907, the Bolivian Minister of Foreign Relations again addressed the American Minister reiterating his views that for this obligation the Government of Chile alone was responsible. In all of this correspondence, the legality and binding effect of this contract was assumed to be and treated as being beyond question.

### *Discussion.*

That the Government of Bolivia has considered as valid and binding the contract of 1876 between itself and John Wheelwright is clearly shown by the correspondence which has passed between it and the Government of the United States regarding this claim,

as is amply demonstrated by the following correspondence passing between the representatives of the two Governments.

Pursuant to the instructions of his Government, the American Minister at La Paz on July 31, 1906, addressed to the Minister of Foreign Relations of Bolivia the following note:

“LEGATION OF THE UNITED STATES,

“La Paz, Bolivia, July 31st, 1906.

“SIR:

“Referring to this Legation's Despatch of September 27th, 1904, relative to the claim of Alsop & Co., and acting upon instructions of June 15, 1906, from my Government, I have the honor to say that although Chile in the Treaty of October 20, 1904, assumed and agrees to satisfy this Claim (See Art V of the Treaty of October 20, 1904, and the notes between Bolivian Minister Dr. Gutierrez, and the Chilean Minister of Foreign Affairs, Dr. Bello Codecido, of October 21st, 1904, interpreting Art. V of said Treaty) *such assumption and agreement does not release Bolivia from her original liability, should Chile default in the performance of her obligation*; and, in this connection, I have the honor to invite Your Excellency's attention to the following facts: (1) that the Alsop Claim has not been paid or satisfied; (2) That the Chilean Government inquired through the American Minister at Santiago, Mr. Wilson, on the 4th of December 1903, whether an offer of 954,285 Chilean Dollars, would be accepted in settlement of the Claim; (3) That the Department of State at Washington replied on the 17th of December 1903, that the offer was declined as inadequate; (4) That subsequently the American Minister, Mr. Wilson, was informed by the Chilean Government that as soon as the pending treaty between Chile and Bolivia was concluded it would take up the Alsop Claim and give it particular and generous consideration; (5) That after the ratification of the Treaty of October 20, 1904, the Chilean Minister at Washington made an offer of 524,333 Chilean Pesos in settlement of the Claim, which the Department of State, in a despatch of January 10, 1905, characterized as ‘entirely inadequate to the just satisfaction of the Claim and not in accord with the previous assurance given by the Chilean Government to the American Minister at Santiago, that the Alsop Claim should receive just and even generous treatment.’

“No further offer having been received from the Chilean Government, and the Claim being still unsettled, in order to assist my Government in arriving at a just estimate of the amount of money which Chile ought to pay on account of Bolivia in final liquidation of the Claim, if Bolivia is to be released from the original liability, I am further instructed by my Government to request that Your Excellency kindly furnish this Legation, for transmission to the Department of State at Washington, with duplicates of the following documents:

“1. ‘All of the accounts of the Alsop or Pedro Lopez Gama Claim which were the bases and subject of the liquidation of December 26, 1876; (See Supreme Decree of December 24, 1876).

“2. ‘All of the documents relating to the liquidation previous to that of December 26, 1876.

"3. 'All, or the part of the 'Memoria' of Dr. Manuel Ignacio Salvatierra, Bolivian Minister of Hacienda, of November 20, 1877, relative to the liquidation, or Decree of December 26, 1876, and also, the part of the said 'Memoria' relating to the liquidation of the Alsop Claim, as approved by the Constitutional Congress of 1878; (See Decree of February 12th, 1878);

"4. 'All of the representations which Bolivia has made with respect to the Alsop claim to the Chilean Government;

"5. 'A full copy of the Protocol of May 19, 1891, relating to the principal and interests of the 'Pedro Lopez Gama credit;

"6. 'A full copy of the Protocol of May 28, 1895, providing that certain credits, including those of Pedro Lopez Gama (of whom Alsop & Co. were assignees) should be examined by the Government of Chile in order to fix the definite amount due.

"7. 'A full copy of the 'Antecedents' as countersigned by the Minister of Bolivia in Chile in his Memorandum of May 23, 1895; and

"8. 'A Memorandum showing what liquidation, if any, have been made between Chile and the Claimants, other than those of Alsop & Co. contemplated in Art. V. of the Treaty of October 20, 1904, and if any liquidations have been made, upon what bases.'

"It gives me great pleasure to again renew to Your Excellency the assurances of my high esteem and most distinguished consideration.

"Your obedient servant.

"(Signed) WILLIAM B. SORSBY.

"His Excellency Dr. CLAUDIO PINILLA,

"*Minister for Foreign Affairs of Bolivia, Present.*"<sup>a</sup>

Under date of September 21st, the Minister of Foreign Relations of Bolivia acknowledged the American Minister's note of July 31st in the following language:

"No. 24

"MINISTRY OF FOREIGN AFFAIRS,

"*La Paz, September 21st, 1906.*

"Mr. MINISTER:

"I have in my power, your appreciated communication of July 31st. last, calling attention to the fact that although Chile assumed in the Treaty of Peace celebrated with this Republic the obligation to satisfy among others the credit of Messrs Alsop & Co. this assumption and agreement does not free Bolivia from the original responsibility should Chile default in its obligation, and in view of which you deem fit to call the attention of this Ministry to various incidents of the negotiations initiated to bring about the above mentioned payment and ask that there be supplied to that Legation, to be forwarded to the Department of State at Washington, duplicate copies of various documents relating to the matter.

"In reply I beg to advise Your Excellency that my Government has always considered that the responsibilities derived from obligations affecting the coast territory have followed the fortune of that territory and should be assumed by the holder thereof, the products of which have been enjoyed exclusively thereby, and that the generic responsibility founded on the general principles of law has assumed

<sup>a</sup> I. Appendix p. 32.

a positive character by the consummation of the Treaty of October 20, 1904, celebrated precisely with the object of settling all questions arising out of the cession of territory there contemplated and among them in a specific manner the credit of Messrs. Alsop & Co. By virtue of which, the same efforts which Your Excellency mentions in the Despatch under reply are proofs of the perfect and absolute understanding of the stipulation referred to, efforts which will surely result satisfactorily in view of the justice and equanimity of the Governments of Chile and the United States.

"For these reasons and in the hope of contributing to a prompt understanding between the Governments mentioned, the Government of Bolivia does not find it improper to supply your Legation with the copies requested by Your Excellency, the originals of which are on file with the sole exception of that indicated by the Number 8, whose antecedents have not been made known to my Government by that of Chile, and in view of which the liquidation and payment of the credits which, like that of Messrs. Alsop & Co. previously devolved on Bolivia, are now and as a result of the arrangement of October 20th of the sole responsibility and province of the former Republic.

"I renew to Your Excellency the assurances of my high and distinguished consideration.

"(Signed) CLAUDIO PINILLA.

"His Excellency Mr. WILLIAM B. SORSBY,

*"Envoy Extraordinary and Minister Plenipotentiary  
of the United States of North America."*<sup>a</sup>

Under date of September 28, 1906, the American Minister cabled the results of his inquiries regarding this claim as follows:

[Paraphrase.]

Minister for Foreign Affairs of Bolivia, in connection with the Alsop claim, states that the copies requested will be furnished within two weeks, but considers that the liquidation of all the claims referred to in the treaty of October 20, 1904, pertains exclusively to Chile, as a result of such treaty. He verbally refers to the notes exchanged at Santiago, October 21, 1904, between Señor Gutierrez (Bolivian Minister to Chile), and the Chilean Minister for Foreign Affairs defining the purport of Article 5 of the treaty, in defense of his position. Minister for Foreign Affairs verbally says it is his understanding that Chilean claims have been settled, but does not know basis as Chile has not advised.<sup>b</sup>

On October 6, 1906, the Minister of Foreign Relations of Bolivia addressed to the American Minister at La Paz the following note, accompanying it by the inclosures therein specified:

[Translation.]

"No. 30: "MINISTRY OF FOREIGN AFFAIRS OF BOLIVIA,  
"La Paz, October 6th, 1906.

"Mr. MINISTER:

"Referring to your estimable communication of July 31st. last, in which you request to be furnished with various documents, I

<sup>a</sup> I Appendix, p. 35.

<sup>b</sup> I Appendix, p. 36.



have the pleasure of remitting to your Legation, together with this despatch, the following:

“ ‘Resolution of December 21, 1872, recognizing in favor of Pedro Lopez Gama the right to the value of One hundred and fifty thousand registered tons of Guano.’

“ ‘Resolution of December 18, 1875 declaring Pedro Lopez Gama not responsible for the failure of exploitation that paralyzed the payment of the credit.’

“ ‘Resolution of January 22, 1876, supporting that of December 18, 1875.’

“ ‘Resolution of February 7, 1876, ordering the authorization of the respective public documents.’

“ ‘Resolution of December 23, 1876, establishing the conditions of the exploitation of the estacas-minas adjudicated to the house of Alsop & Co.’

“ ‘Resolution of December 24, 1876 agreeing to an adjustment with the representatives of Messrs. Alsop & Co.’

“ ‘Protocol with respect to creditors signed May 28, 1895, by Señor Heriberto Gutierrez and Señor Luis Barros Borgoño.’

“ ‘Mémorandum of May 23, 1895, to which the foregoing protocol refers.’

“The documents enumerated are in duplicate, as per your request.

“I have to say that as soon as the other copies are finished they will be remitted to your Legation.

“I have the honor to renew the assurances of my most highest and most distinguished consideration.

“(Signed.) CLAUDIO PINILLA.

“His Excellency Mr. WILLIAM B. SORSBY,

“*E. E. and Minister Plenipotentiary of the United States of North America. Present.*”<sup>a</sup>

It will thus be observed that the Government of Bolivia not only admits by these letters that the Wheelwright contract is valid but furnishes the documents upon which it considered that contract as resting.

On July 16, 1907, the matter having been again brought to the attention of Bolivia by the American Minister at La Paz, the latter sent to the Department of State the following cable:

[Paraphrase.]

The Government of Bolivia insists that clause 5 of the Bolivian-Chilean treaty of October 20, 1904, when taken in connection with the explanatory notes of October 21, 1904, which were exchanged at Santiago between the Minister of Foreign Relations of Chile and the Bolivian Minister at Santiago, relieves Bolivia from its responsibility upon the claims specified in the treaty. The Acting Minister of Foreign Relations of Bolivia makes an offer to represent to Chile that the Government of Bolivia has received notice from the Government of the United States of the nonfulfillment of its obligation under treaty to settle the Alsop claim.<sup>b</sup>

<sup>a</sup> I Appendix, p. 37.

<sup>b</sup> I Appendix, p. 38.

In taking this ground the Government of Bolivia again indicated that it regarded this contract as valid and binding.

On July 22, 1907, the matter having been once more called to the attention of the Minister of Foreign Relations of Bolivia by the American Minister at La Paz, the latter again informed his Government by cable as follows:'

[Paraphrase.]

Minister of Bolivia to Santiago is in La Paz on leave of absence until September. Minister of Foreign Relations of Bolivia has promised me that the noncompliance by Chile with the treaty obligations with respect to the settlement of the Alsop claim will be made the subject of representations by the Bolivian Minister upon his return to Santiago.<sup>a</sup>

Here again the Bolivian Government recognized the Wheelwright contract as a valid and existing liability and also that it was under some obligation to arrange for its settlement.

On July 25th, 1907, the American Minister presented to the Minister of Foreign Relations a note enclosing a copy of the Department's instructions to the American Minister at Santiago.

In replying to this note, under date of September 10th, 1907, the Bolivian Minister of Foreign Relations used the following language:

"No. 91.

*"La Paz, September 10th, 1907.*

"SIR: I have had the honor to receive your despatch of July 25th, last, in which Your Excellency states that your Government has instructed you to call the attention of this Chancery to the fact that the Government of Chile, notwithstanding the agreements made with Bolivia in the Treaty of Peace of October 20, 1904, for the payment of the credits that weighed upon the littoral of Bolivia, has not yet cancelled that of Alsop & Co.

"Your Excellency adds that when the two countries made the agreement referred to they did not consult the wish of the creditor, Alsop & Co., and therefore, in accordance with Article No. 5 of the Treaty of Peace, Bolivia is not free from the obligations that it contracted with the said creditor. Finally, Your Excellency desires that my Government discuss the matter with that of Chile in order to obtain the payment of the aforesaid credit, and thus complete that which was agreed upon in the Treaty of Peace and in the repetitions of October 21, 1904.

"In reply, I wish to state that on this occasion my Government does not estimate in the same manner as Your Excellency the responsibility of Bolivia relative to the credit of Messrs. Alsop & Co., because, when we are treating of real obligations, the possessor of an object, whoever he may be, continues to be always attached to

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<sup>a</sup> I Appendix, p. 38.

the obligation. In the present case, Your Excellency may remember that at the payment of the credit acknowledged as due Messrs. Alsop & Co., various mines in the littoral of Bolivia were concerned, thereby constituting a true pledge, which still subsists not only in accordance with the principles of civil law, but also because of the fact that in the Treaty of Peace the Government of Chile expressly recognized this credit which falls on the said littoral, and which has become part of its territory. It seems that the creditor has also recognized it in a similar manner, because of the fact that he has already taken steps to obtain payment of the claim from that Government. Nevertheless, submitting with pleasure to the desire of Your Excellency, I have directed to the Legation of Bolivia in Chile the proper instructions, in order that by means of its friendly offices with that Government it may obtain an adjustment of this matter in the best possible way.

"I trust that Your Excellency will accept the assurance of my highest and most distinguished consideration.

(Signed.) J. M. SARACHO.

"To His Excellency Mr. WILLIAM B. SORSBY,

*Envoy Extraordinary and Minister Plenipotentiary*

*"of the United States of America."*<sup>a</sup>

Under date of September 17, 1907, the Minister of the United States at La Paz again communicated to his Government by cable, stating that the Bolivian Minister for Chile was expecting to arrive in Santiago about the 25th of September and that he had been instructed to make the representations relative to the Alsop claim which had been promised in conference with the Acting Bolivian Minister of Foreign Relations and himself.

It will appear from the foregoing correspondence that not only has the Government of Bolivia recognized that the Wheelwright contract of 1876 was a legal and binding contract, but that Government has also furnished a number of documents which, in its judgment, form the basis of this agreement and comprise the antecedents thereof. It appears moreover that, at the instance of the Government of the United States, it has undertaken to endeavor to induce the Government of Chile properly to meet this obligation. Finally, it is clear that the Government of Bolivia considers that the Government of Chile is under obligation directly and fully to meet this debt due under the Wheelwright contract.

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<sup>a</sup> I Appendix, p. 39.

### *Sub-Point C.*

C<sup>4</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Governments of Bolivia and Chile in the various formal protocols and treaties made by and between said Governments, in which protocols and treaties provision has been definitely made for the payment of the debt recognized as due by said contract.

### *Prefatory Summary.*

It will be observed from the discussion which follows that before the Pact of Truce of 1884 was signed, the existence of the Wheelwright contract was directly and specifically brought to the attention of the negotiators of that Pact by Wheelwright personally and by his agent, Jackson; that notwithstanding this no provision was made in the Pact for the recognition of the Wheelwright contract or the rights, titles, and interests which had accrued and vested thereunder; and that while the Government of Chile provided in such Pact for the liquidation of the obligations due from Bolivia to citizens of Chile, yet under this arrangement Alsop & Co. have received not one cent of the millions of dollars which have been paid under the provisions of this Pact. It appears, however, that notwithstanding this failure to recognize the claim in the Pact of Truce, the claim has been recognized for its full amount with interest in the Matta-Reyes Protocol of May 19, 1891; that it was also recognized in the Treaty of Peace and Friendship of 1895 as supplemented by the protocol of May 28, 1895, and the memorandum of May 23, 1895, as also the protocols signed on December 9, 1895, and April 30, 1906. Moreover, in the final treaty of October 20, 1904, the payment of the debt is distinctly recognized as an obligation upon the part of Chile, and notwithstanding that in Article 5 of the treaty but 2,000,000 pesos in gold of 18 pence is appropriated for the payment of this and various other obligations due from Bolivia to various claimants and assumed by Chile in this treaty and that therefore it might appear that the liability of Chile was limited, nevertheless secret

notes exchanged between the plenipotentiaries of the two Governments under date of October 21, 1904, show that the obligation assumed by Chile in this case was unlimited and that it was understood that Chile should answer for the full amount of these debts.

*Discussion.*

On November 23, 1883, Mr. Wheelwright addressed to Señor Belisario Salinas, the representative who, on behalf of Bolivia, signed the Pact of Truce on April 4, 1884, the following letter:

*"Antofagasta, 23d November 1883.*

"BELISARIO SALINAS, Esq<sup>re</sup>,  
&c &c &c

"DEAR SIR, Knowing that you come from La Paz accompanied by Mr. Belisario Boeto, in order to treat with Chili about terms of peace, I take the liberty to address you this letter, trusting that you will kindly attend to the recommendation which is the object of these lines, although I had not intimate relations with you during my stay in former years in that city.

"Having, as you may perhaps know, a Contract by which the Bolivian Government adjudicated to me the divisions (estacas) called 'Public Instruction' of the Littoral in payment of a debt; a Contract which I am endeavoring to have respected by Chili on the same terms as by Bolivia in case the Littoral should remain under the dominion of the former of the two Countries, I take the liberty of introducing to you, through this letter, Mr John Stewart Jackson of Valparaiso, whom I have entrusted to adopt there, in my name, the measures conducive to the obtaining of my desires.

"Mr. Jackson being worthy of all consideration and having my complete confidence, I would esteem it very sincerely if you would extend to him in the execution of his commission, the same benevolence and facilities which I embrace the hope you would have bestowed upon me personally.

"Begging you kindly to excuse the liberty I have taken,

"I have the pleasure to remain,

"Yours truly,

"JOHN WHEELWRIGHT." <sup>a</sup>

Under date of December 11th, 1883, Señor Salinas, writing from Santiago, replied to this letter in the following terms:

*"Santiago, 11th December 1883.*

"JOHN WHEELWRIGHT, Esq<sup>re</sup>,  
"Antofagasta.

"DEAR SIR: I had opportunely the pleasure of receiving through the house of Jackson at Valparaiso, your valued favour of 23<sup>rd</sup> ultimo, as well as the explanation concerning the matter of the Mining Divisions (Estacas) of the Bolivian Littoral.

"In reply thereto I have the satisfaction to say that when the proper moment has arrived to treat of those subjects in the course of negotiations

*with the Chilean Government, I shall bear in mind your indication in order to arrive at the solution desired by you.*

"Meanwhile, I remain Dear Sir,

"Yours faithfully,

"B. SALINAS." <sup>a</sup>

On or about March 21, 1884, John Stewart Jackson, writing for and in behalf of John Wheelwright, petitioned the authorities of Chile for a recognition of the rights granted to Wheelwright in the Contract of December 26, 1876, concluding his petition with the following language:

"Mr. Wheelwright believing therefore that the contract made by him with the Government of Bolivia concerning the Public Instruction Estacas is perfectly valid; that said contract has continued in force notwithstanding the rescission of the treaty of boundaries of 1874; and that not only in equity but also in justice Chile should respect that contract; and that if he could assure the rights acquired under that contract by Messrs Alsop & Co., it would be more easy for him to organize private associations for the working and exploitation of the Estacas, with benefit to his principals and to the country itself, *he deems it opportune and convenient to address himself now to the Government of Your Exc'cy, inasmuch as his former communications which were accompanied by the respective antecedents, have produced no results whatever, to the end that in the treaty of peace that may be made with the Government of Bolivia, or in any arrangements whatever that may be concluded with the same, or in any other efficacious manner, the contract embraced in the public instrument of 26th December, 1876, made by him with the Government of Bolivia, may be recognized as valid and in force, and that he be guaranteed the full and free exercise of all the rights conferred upon him therein, exactly as though there had been no change whatever in the dominion over the territory in which the Estacas are located.*" <sup>b</sup>

Notwithstanding these petitions to the representatives of Bolivia and of Chile on behalf of the interests held by John Wheelwright, the Pact of Truce, which was drawn up and signed April 4, 1884, made no specific provision for the recognition of the rights of Wheelwright under this contract. The treaty did, however, make the following provisions regarding claims of *Chilean citizens* against Bolivia. It was provided in Articles 3 and 4 that:

"Third.—The properties sequestered in Bolivia from Chilian citizens by decrees of the Government, or by measures emanating from civil and military authorities, shall be immediately returned to their owners or to the representatives constituted by them, with sufficient powers.

"The product which the Government of Bolivia may have received from said properties, and which may be proved by documents relating thereto, shall likewise be returned.

<sup>a</sup> II Appendix, p. 198.

<sup>b</sup> II Appendix, p. 207.

*"The losses which may have been suffered by Chilean citizens through the causes mentioned, or by the destruction of their properties, shall be indemnified in virtue of the demands which the interested parties shall bring before the Government of Bolivia."*

"Fourth.—If the Government of Bolivia and the parties concerned should not come to an agreement respecting the amount and indemnity for losses and the manner of payment, the points at issue shall be submitted to the arbitration of a commission composed of one member named by Chili, another by Bolivia, and a third named in Chili, by mutual accord; from amongst the neutral representatives accredited to this country. This nomination shall be made as soon as possible."<sup>a</sup>

Article 6 of the treaty provided:

"Sixth.—In the port of Arica the import duties on foreign goods destined for consumption in Bolivia shall be recovered in conformity with the Chilean tariff, and these goods shall not be subject to the imposition of any other duty in the interior. The returns of that Custom House shall be divided in this manner: Twenty-five per cent. shall be applied to the service of the Custom House and to the part which corresponds to Chili for the despatch of the merchandise for consumption in the territories of Tacna and Arica, and seventy-five per cent. for Bolivia. This seventy-five per cent. shall be divided, for the present, in the following manner: *Forty parts shall be retained by the Chilean Administration for the payment of the sums which may result as owing by Bolivia in the settlements which may take place, according to the third clause of this pact, and to cover the unpaid part of the Bolivian Loan raised in Chili in 1867, and the balance shall be delivered to the Bolivian Government in currency or in drafts to its order.* In the settlement and payment of the loan, it shall be considered on equal terms with the claimants for damages in the war.

"The Bolivian Government, at its convenience, can inspect, by means of its Customs' Agents, the accounts of the Arica Custom House.

*"When the indemnities referred to in the third article have been paid, and the retention of the aforesaid fortieth part shall, on this account, have ceased, Bolivia can establish her interior Custom Houses in the part of her territory which she may deem convenient. In this case foreign merchandise shall have free transit through Arica."*<sup>b</sup>

In a supplementary protocol signed on April 8, 1884, which provided the final scheme of apportionment of the customs receipts, the disposition of which was arranged for in Article 6 of the protocol, the following provisions are made:

"The Minister of Foreign Affairs answered: That in view of the explanations and reasons expressed, he would defer with pleasure to the indication of the Ministers Plenipotentiaries of Bolivia.

"The Minister of Foreign Affairs then stated that, according to the different versions ascribed to the sixth clause, in the part referring to the division which, for the present, is to be made of the seventy-five per cent. corresponding to Bolivia, it might be inter-

<sup>a</sup> II Appendix, pp. 325-326.

<sup>b</sup> II Appendix, pp. 326-327.

preted in a sense contrary to the wish of the contracting parties; and that, to avoid all difficulty in future, *he considered it necessary that it should be declared that, of the total of the receipts of the Arica Custom House, twenty-five per cent. corresponded to the Government of Chili, forty per cent for the indemnities, of which the third clause speaks, and the payment of the Bolivian Loan of 1867, and thirty-five per cent. to the Government of Bolivia, thus completing the one hundred per cent. which was taken to begin with.*"<sup>a</sup>

As has been already pointed out in the Historical Résumé, the significant thing regarding these provisions is this, that notwithstanding the later contention of Chile (first made after the claim of Alsop & Co. had been diplomatically urged upon her attention for a score of years) that this claim was the claim of a Chilean citizen (Alsop & Co., though composed entirely of American citizens and investing only American capital, having been registered in Chile), yet during all this period, and during the time that Chile was securing from the Government of Bolivia under this Pact and its Complementary Protocol large sums to liquidate, and which it would seem did in fact liquidate, the indebtedness of Bolivia to Chile and to Chilean citizens, not one word was said by Chile of the right of Alsop & Co. to participate in these funds as a Chilean citizen, and not one cent was offered or paid to Alsop & Co. by virtue of this solemn international pact, made and entered into by and between the two Governments for the liquidation of Chilean claims; and yet it is entirely obvious that the disposition of the receipts of the Custom House of Arica in accordance with the provisions of this Protocol, and without permitting Alsop & Co. to participate therein, not only wholly disregarded the rights thereto possessed by Mr. Wheelwright under his contract with the Bolivian Government, but also constituted a tortious misapplication of the funds definitely and specifically appropriated to the liquidation of the Wheelwright debt. The course pursued by the Government of Chile in this matter suggests far better than mere words that at this period of the controversy the Government of Chile did not have the slightest thought that this claim was the claim of Chilean citizens or that it was anything other than what it really is—an American claim.

On May 19, 1891, the "Minister of Foreign Relations, Serapio Reyes Ortiz, and Vice President of the Republic of Bolivia, and Mr. Gonzala Matta, Confidential Agent of the Junta de Gobierno, organized on behalf of the Congress of Chile, met in the Department of Foreign Relations," and "in consequence, both parties

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<sup>a</sup> II Appendix, p. 328.



being animated always with the sincere desire to arrive at a definite arrangement inspired by cordiality which should reign between both nations and recognizing equality in every possible manner, they have agreed to draft the basis of definite treaties which will be taken up when peace shall have been re-established in Chile. These bases, which will serve as a necessary part of the treaties of peace and commerce, were thoroughly discussed and are as follows:

\*            \*            \*            \*            \*            \*

"2nd. *The Government of Chile will take charge of and assume the payment of the obligations recognized by that of Bolivia in favor of the mineral enterprises of Huanchaca, Corocoro and Oruro, deducting the amounts in accordance with the Compact of Truce, as well as the credits which encumbered the income from the Littoral by reason thereof and which are that of the Garantizador de Valores Bank of Chile, the bonds issued for the construction of the railroad of Mejillones, the credit acknowledged in favor of Lopez Gama representing the house of Alsop & Co. of Valparaiso, and that of 40,000 bolivianos in favor of the Garday family; the products of the custom houses of Arica and Antofagasta, in consequence remaining free of all encumbrance on importations for Bolivia.*<sup>a</sup>

"3rd. The sums which make up the credits referred to above as taken from the books of the National Treasury of Bolivia are as follows:

"Huanchaca Co .....	1, 280, 000
"Corocoro Co .....	1, 634, 000
"Oruro .....	252, 000
"Banco Garantizador de Valores ..	718, 000
"Railroad of Mejillones .....	219, 000
"Lopez Gama credit .....	835, 000
"Garday credit .....	40, 000
	<hr/>
	4, 978, 000
"Funds deposited .....	535, 000
	<hr/>
	4, 443, 000

*"The sums approximated are considered without interest; and, with which, according to liquidation made, reach the amount of six millions six hundred and four thousand pesos."*<sup>b</sup>

As has been already pointed out, it seems sufficiently clear, when the matter is considered in connection with the statement made by the Chilean Sub-Secretary of Foreign Relations to the Minister of the United States, when, in June, 1892, the former (the contract of December 26, 1876, having been shown to him) recognized that interest was due upon the Wheelwright contract, that the provisions of this protocol demonstrate that at this time the Government of Chile, as well as the Government of Bolivia, considered as due to the claimants not only the principal sum called

<sup>a</sup> II Appendix, p. 372.

<sup>b</sup> II Appendix, p. 373.

for by the Wheelwright contract of 1876, but also the interest due under the said contract as well.

Under date of May 18, 1895, Don Luis Barros Borgoña, Minister of Foreign Relations of Chile, and Don Heriberto Gutierrez, representing Bolivia, signed at Santiago a Treaty of Peace and Friendship, which provides in Article 2 as follows:

*"The Government of Chile assumes the obligations recognized by the Government of Bolivia in favor of the mining enterprises of Huanchaca, Corocoro and Oruro, and binds itself to pay the same as well as the balance of the Bolivian loan raised in Chile in 1867, after deducting therefrom all the sums of money which, under Article Sixth of the Truce, are to be allowed in the settlement of this account. It binds itself furthermore to pay the following debts which encumbered the Bolivian littoral, namely: the bonds issued for the construction of the Mejillones and Caracoles Railroad; the credit of Don Pedro Lopez Gama, now represented by the firm of Alsoop & Co., of Valparaiso; the credit of Don Enrique G. Meiggs, represented by Don Edward Squire, founded on contract of May 20, 1876, entered into between the above named Meiggs and the Government of Bolivia for the farming out of the fiscal nitrate beds at Toco, and the credit recognized in favor of Don Juan Garday.*

*"All these credits shall be individually liquidated, item by item, in a protocol supplementary to the present treaty."*<sup>a</sup>

On May 28, 1895, the same representatives of the respective Governments entered into a supplemental protocol, which reads as follows:

*"The Undersigned, Don Luis Barros Borgoña, Minister of Foreign Affairs of Chile; and Don Heriberto Gutierrez, Envoy Extraordinary and Minister Plenipotentiary of Bolivia in Chile; having met at the former's office at Santiago, Chile, on this 28th day of May 1895, for the purpose of defining and precisng the provisions stipulated in art. 2nd of the treaty of peace and amity which has been entered into between the two Republics have agreed to have constancy of the following bases which are to serve for the liquidation of the obligations enumerated in the aforesaid treaty.*

*"1st. Those credits which, according to the pact of truce (between Chile and Bolivia) of 1884, were recognized by the Govt. of Bolivia, shall continue to be served with an amount equal to the 40% of the receipts of the Arica Custom House. In order to establish the said amount, an average will be taken of the receipts of the said Custom House during the last five years.*

*"2nd. The holders of the credits referred to in the preceding clause may receive in payment thereof bonds of the Internal Debt of the Republic of Chili, bearing interest at the rate of 4% or at rate of 5% p. a. with 1% for accumulative amortization, provided that such holders agree, for that purpose, to consider as subsisting the liquidations which, by the contracts executed in 1889, were agreed to by Don Heriberto Gutierrez, acting for the Govt. of Bolivia, and the said holders.*

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<sup>a</sup> II Appendix, p. 452.

"3rd. Those credits which are not included in the declaration aforesaid and which are those of the Mejillones and Caracoles Railway, of Pedro Lopez Gama, of Juan Garday and of John G. Meiggs, shall be examined by the Government of Chile, which Government in order to fix the definite amount due and to agree as to the form of payment thereof, will take into account the origin of each credit, and also the antecedents of the same consigned by the Minister of Bolivia in Chile in his memorandum of the 23rd of the present month. (May 23rd 1895)

"4th. Should Bolivia prefer to take to its charge the credits, or part of the credits referred to in the preceding clauses, the amounts to which these may reach are to be deducted from the amount which Bolivia is to pay to Chile in virtue of other stipulations contained in the treaties entered into on the 18th of the present month (treaty of peace and amity and treaty of transfer of territory)

"5. The memorandum to which reference is made in this protocol (clause 3rd) signed in this city by the Minister of Bolivia in Chile on the 23rd of the present month, is added as an annex thereto.

"In faith whereof and in virtue of the full powers with which they are invested, the undersigned have signed this protocol in two copies.

"(Signed.)

LUIS BARROS BORGONO.

"HERIBERTO GUTIERREZ." <sup>a</sup>

The memorandum referred to in clauses 3 and 5 of the above protocol, reads, so far as it relates to the Gama credit, as follows:

"MEMORANDUM.

"Memorandum of the claims existing against Bolivia, with the payment of which the Chilean Government is charged according to Article 2 of the final Treaty of Peace signed between both Republics on May 18, 1895:

*	*	*	*	*	*	*
"Pedro Lopez Gama: Claim recognized in favor of Messrs. Alsop & Co., assignees of the rights of the former, amounting, <i>without reckoning interest</i> , to 835,000 bolivianos at 20d each, which, reduced to Chilean money at an exchange of 171/2d, equals. . . . . \$954,285.00						
*	*	*	*	*	*	*

"Santiago, May 23, 1895.

"(Signed.)

H. GUTIERREZ,

"Minister of Bolivia" <sup>b</sup>

On December 9, 1895, the representatives of the two Governments signed a protocol which stipulated, Article 5, that "Bolivia does not recognize liabilities or responsibilities of any kind attaching to the territories that she shall transfer to Chile such liabilities having been assumed by the Government of Chile." <sup>c</sup>

<sup>a</sup> II Appendix, p. 457.

<sup>b</sup> I Appendix, p. 372.

<sup>c</sup> II Appendix, p. 459.

On April 30, 1896, the representatives of the two Governments signed another protocol, which provided, Article 2, that—

“The Government of Bolivia shall submit to the approval of the Congress of that Republic the Protocol relative to the liquidation of debts signed at Santiago on the 28th of May, 1895, as also the explanation to which the preceding article refers, defining the provisions of Article IV of the Protocol of the 9th of December, 1895.”<sup>a</sup>

Finally, on October 20, 1904, the Governments of Chile and Bolivia agreed upon a general treaty, which was later ratified and proclaimed, and which provided in Article 5 as follows:

“ARTICLE 5. *The Republic of Chile devotes to the final cancellation of the credits recognized by Bolivia, for indemnities in favor of the Mining Companies in Huanchaca, Oruro and Corocoro, and for the balance of the loan raised in Chile in the Year 1867 the sum of 4,500,000 pesos gold of 18 pence payable at the option of its Government in cash or in bonds of its foreign debt valued at their price in London on the day on which the payment is made and the sum of 2,000,000 pesos in gold of 18 pence in the same form as the preceding for the cancellation of the credits arising from the following obligations of Bolivia:—the bonds issued, i. e. the loan raised for the construction of the railroad between Mejillones and Caracoles according to the contract of July 10, 1872; the debt recognized to Don Pedro Lopez Gama represented by Messrs Alsop & Co., successors of the former's rights; the credits recognized to Don John G. Meiggs, represented by Mr. Edward Squire, arising from the contract entered into March 20th, 1876, for renting nitrate fields in Toco, and lastly, the sum recognized to Don Juan Garday.*”<sup>b</sup>

At the same time that this treaty was negotiated, the Government of Bolivia, fearing perhaps that some doubt might arise regarding the extent of the liability of Chile under this treaty, set forth its understanding of the undertaking of the Government of Chile in the following note:

“LEGATION OF BOLIVIA,

“Santiago, October 21, 1904.

“MR. MINISTER: The Government of Bolivia agrees with Your Excellency's Government on the necessity of determining the purport of the wording of Article 5 of the Treaty of Peace and Friendship signed to day by Your Excellency on behalf of the Government of Chile and by the undersigned in representation of the Government of Bolivia.

“Both in regard to the claim of the Corocoro, Huanchaca, and Oruro companies and of the bond holders of the Bolivian loan of 1867 which were being paid out of 40% of the receipts of the Arica Custom House, and in regard to the claims against Bolivia of the bond holders of the Mejillones railroad, of *Alsop & Co. (assignees of Pedro Lopez Gama)*, of the estate of Juan Garday, and of Edward Squire, it has been agreed that the Government of Chile shall permanently cancel all of them, so that Bolivia shall be relieved of all liability,

<sup>a</sup> II Appendix, p. 460.

<sup>b</sup> I Appendix, p. 440.

*the Government of Chile being obligated to answer every subsequent claim presented either by private means or through diplomatic channels, and considering itself liable for every obligation, bond, or document of the Government of Bolivia relating to any of the claims enumerated, Bolivia's liability being entirely eliminated for all time and the Government of Chile assuming all liabilities to their full extent.*

"My Government desires that your Excellency may be pleased to state to me, on behalf of the Government of Chile, whether this is the purport which it has given to article 5 of the Treaty of Peace and Friendship signed to day between the representatives of the two Governments.

"I avail myself of this opportunity to renew to Your Excellency the assurances of my high and distinguished consideration.

"(Signed.) A. GUTIERREZ

"To His Excellency Mr. EMILIO BELLO C.

*"Minister of Foreign Relations, City."*<sup>a</sup>

To this note, the representative of Chile made the following reply:

"REPUBLIC OF CHILE

"MINISTRY OF FOREIGN RELATIONS

*"Santiago, October 21, 1904.*

"MR. MINISTER: In reply to the note which Your Excellency addressed to me on this day *I take pleasure, in compliance with your request, in defining the purport which this Chancellery assigns to clause 5 of the Treaty of Peace and Friendship signed to day by Your Excellency in representation of the Government of Bolivia and by the undersigned on behalf of the Government of Chile.*

"My Government considers that the obligation which Chile contracts by Article 5 of the said Treaty comprises that of arranging directly, with the two groups of creditors recognized by Bolivia, for the permanent cancellation of each of the claims mentioned in said article, thus relieving Bolivia of all subsequent liabilities.

"It is consequently understood that Chile, as successor of all the obligations and rights which might be incumbent on or pertain to Bolivia in connection with these claims, shall answer any reclamation which may be presented to Your Excellency's Government by any of the parties interested in the said claim.

"I renew to Your Excellency the assurances of my highest and most distinguished consideration.

"(Signed.) EMILIO BELLO C.

[SEAL.]

"To his excellency Mr. ALBERTO GUTIERREZ,

*"E. E. M. P. of Bolivia."*<sup>a</sup>

It appears, therefore, that the two Governments, in the various treaties and protocols negotiated by them regarding the Bolivian Littoral and matters connected therewith, have uniformly and without doubt or equivocation recognized as legal and binding the Wheelwright contract of 1876.

<sup>a</sup> I Appendix, p. 444.

### *Sub-Point C.*

C<sup>5</sup> The validity and binding effect of this contract have been recognized and approved by the Government of Chile in a number of executive decrees issued to its officers of local administration concerning the enforcement and operation of this contract, after the occupation of the Bolivian Littoral by the Chilean forces.

### *Prefatory Summary.*

While, as will appear from the matter as it is more fully set forth hereinafter, the Executive of Chile and the local administrative officers have on occasion recognized the validity of this contract, such recognitions are not considerable in numbers. It is clear, however, that on October 27, 1884, the Chief Secretary of the Ministry of Finance directed that a report be made concerning the government mines which were operated by Wheelwright in the Littoral, and that a report of these was made under date of November 15, 1884.

### *Discussion.*

In March, 1884, John Stewart Jackson, representing John Wheelwright, filed before the Chilean authorities a petition in which he prayed, as has already been indicated, for protection by the Chilean Government of the rights of Mr. Wheelwright under his contract with the Bolivian Government.<sup>a</sup> This petition appears to have been answered under date of the 26th of August, 1884, and was later the subject of a report to the Minister of Finance under date of October 9, 1884.<sup>b</sup> The Minister of Finance, moved by these memorials, thereupon took the following action:

“REPUBLIC OF CHILI, MINISTRY OF FINANCE.

“The undersigned, Chief Secretary of the Ministry of Finance, certifies: That in reference to the memorial presented by Mr. John Stewart Jackson, as representative of Mr. John Wheelwright, asking that the rights of his principal be recognized to certain mining sets (estacas-minas) situated in the Coast Province of the North, otherwise called Public Instruction Mines, the following decree has been signed thereon:

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<sup>a</sup> II Appendix, p. 296.

<sup>b</sup> II Appendix, p. 276.

"Santiago, 27th October, 1884.

"Let the Governor of Antofagasta report on the state of the workings of the mining sets called the Public Instruction Mines, causing meanwhile the legal position in which these mining sets were, at the time of the revindication of the territory of Antofagasta, to be respected.

"Let the same be duly noted.

“(Signed.) BARROS LUCO.”

"The above is in conformity with the original.

“(Signed.) R. SOTOMAYOR VALDEZ,  
“Chief Secretary”

[Stamp of the Ministry of Finance.]

"No. 689." <sup>a</sup>

Acting upon this, the Governor of Antofagasta made under date of November 12 the following order:

"OFFICE OF THE GOVERNMENT OF THE  
LITTORAL OF THE NORTH,

"Chili, Antofagasta, 12th November, 1884.

"I annex to the present a dispatch relative to a claim brought before the Supreme Government by Mr. John Wheelwright respecting the estacas of mines known in the time of the Bolivian dominion by the name of Estacas of Public Instruction.

"As the said Minister asks the undersigned for a report respecting the state of exploitation of these estacas, and as you are in a better position to give information respecting the matter, I beg that you will be good enough to report to this office on the subject.

"May God be with you.

“(Signed.) R. RIVERA JOFRÉ.” <sup>b</sup>

Under date of November 15th the following report was made concerning the subject-matter of this inquiry:

"Caracoles, 15th November, 1884.

"OFFICE OF THE SUB-DELEGATE OF CARACOLES.

"The undersigned, in fulfilment of the Report which your Honor asks in the preceding note, after having acquainted himself with the record mentioned therein, referring solely to the mineral district of Caracoles, sets forth: That he knows that since about a year before the occupation of this territory by the Chilian arms, Mr. John Wheelwright has maintained and does maintain here, up to the present date, a legal and salaried representative for the purpose of attending to and looking after the mining sets called Estacas of Public Instruction; and that, during that period of time, he has worked indiscriminately, either on his own account or by contracts with miners, amongst others the following estacas: That of the mine 'Flor del Desierto,' that of the mine 'Rosales,' 'Esmeralda del Sur,' 'Alfin Hallada,' 'Cantiva,' 'San Martin,' 'Santa Isabel,' 'San Rafael,' 'Buena Esperanza,' 'Compañia,' 'Julia,' 'Vallenar,' 'Juana,' 'Frontera,' 'Teresa,' 'Reventon,' 'Disputa,' 'Mapocho,' 'Merceditas,' 'Tres Amigos,' 'Em-

<sup>a</sup> II Appendix, p. 231.

<sup>b</sup> II Appendix, p. 232.

palme,' 'Limbo,' 'San José,' 'Invitacion,' 'Zoila,' 'Francholina,' 'Candeleros,' 'Rosario,' y 'Transaccion.'

"The foregoing is all that I have to report to your Honour about the matter.

"May God be with your Honor.

"(Signed.) E. VILLEGAS." <sup>a</sup>

This report appears to have been transmitted to the Central Government under date of November 18, 1884, with the following communication:

"REPORT.

"GOVERNMENT OF THE COAST OF THE NORTH CHILE,

*"Antofagasta, November 18th, 1884.*

"Complying with the preceding resolution, I have to say to Your Honor that in order to make the report called for, I addressed myself to the subdelegate at Caracoles, Don Enrique Villegas, a very competent person and who by his long residence there, is fully informed as to the work that has been performed and of the condition of all the mines in that mineral district, where Mr. John Wheelwright has a large part of the so-called Public Instruction estacas. *Annexed hereto I send you the report just sent to me by that subdelegate, which refers to what is called for in the preceding resolution of Your Honor. Mr. Wheelwright is also in possession of various other Instruction estacas in several mineral districts north of Latitude 23, concerning which it is somewhat difficult to report as asked, there being in those parts no competent authorities to give information.* As the properties alluded to are scattered about it would be necessary to send special experts to report thereupon, and the undersigned does not deem himself authorized to do this. This is all that I can say in obedience to your order.

"God preserve Your Honor.

"R. RIVERA JOFRÉ." <sup>b</sup>

It will thus appear that the executive branch of the Government of Chile has recognized the existence and validity of this contract through the action of local administrative officers who have made specific reports regarding the mines (specifying the same by name) which Wheelwright held under and pursuant to the terms of the Wheelwright contract of 1876.

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<sup>a</sup> II Appendix, p. 232.

<sup>b</sup> II Appendix, p. 227.



### *Sub-Point C.*

C<sup>6</sup> The validity and binding effect of this contract have been repeatedly recognized and approved by the Government of Chile in its diplomatic correspondence with the Government of the United States.

### *Prefatory Summary.*

The correspondence set forth or alluded to in the discussion which follows upon this point shows that the Government of Chile has never in its diplomatic correspondence suggested any doubt as to the validity of this contract, but on the contrary it has repeatedly recognized the contract as creating a valid and existing obligation which the Government of Chile was prepared to assume and which it intended to assume upon the signing of the final treaty of peace between the Governments of Bolivia and Chile. Expressions going to this point have been made in numerous communications, among others, June 18, 1892, October 10, 1896, October 13, 1897, October 27, 1903, July 2, 1904, December 9, 1904, January 30, 1905, and April 9, 1908. It has, moreover, on various occasions made offers of settlement of this obligation, which action is the best evidence that the Government of Chile considered the obligation binding. These offers of settlement were made in December, 1903, December, 1904, August, 1905, and April, 1908.

### *Discussion.*

In a note from the Minister of Foreign Relations of Chile to the American Minister at Santiago, dated June 18, 1892, the following language is used:

*"In reply I have the pleasure to inform Y. E. that in the preliminary Protocol of a Treaty of Peace between Chile and Bolivia, ratified by the undersigned in the city of Iquique, as Minister of Foreign Relations of the Constitutional Government, the claim of Alsop and Company, which Y. E. has supported, for the sum indicated by Y. E.—\$835,000 Bolivian pesos—figured among the liabilities that the government of Chile engaged to pay for account of Bolivia.*

*"Regarding the payment of interest to which Y. E. refers, the government of the undersigned awaits what may be done in the negotiation that is to follow by the government that recognized the principal obligation;*

*the government of Chile, which only assumes the obligations of a neighboring and friendly country will endeavor to attend to this part of the claim once the government of Bolivia pronounces upon its legitimacy or validity, confining myself, as a proof of deference to the government of Y. E. to offering the assurance that I will carefully take into account the resolution that may be adopted by the government of Bolivia in relation to this point.*

"Upon forwarding what has already been stated the undersigned is pleased that in the Protocol celebrated in Iquique in May 1891 the government of Chile has already taken into account the matter referred to in the esteemed communication of Y. E. to which I have the honor to reply."<sup>a</sup>

On June 22, 1892, the American Minister at Santiago informed the Department of State at Washington that as to the question of interest upon the debt recognized in the above note he had "*addressed a note under this date, enclosure No. 3, giving for the information of the Minister particulars of the contract entered into by the government of Bolivia and reduced to public record in La Paz on the 26th December 1876, recognizing this interest in the same way as the principal debt, which the Sub-Secretary of Foreign Relations assured me would be entirely satisfactory.*"<sup>b</sup>

Under date of October 10, 1896, the American Minister reported to the Department as follows:

*"I have the honor to report that yesterday I had a conversation on the subject with Senor Eduardo Phillips, the Under-Secretary of Foreign Relations, who gave me the following information:*

*"On May 28th, 1895, a protocol, supplementary to the treaties between Chile and Bolivia forwarded to the Department with my No. 85, of May 6th last, was signed. This protocol was approved by the Chilean Congress, in secret session, but is still awaiting the approval of the Congress of Bolivia, and has, therefore, not been published. It has an important bearing upon the claims assumed by the Chilean Government in accordance with the provisions of article 2 of the Treaty of Peace and Amity, of May 18th, 1895.*

*"According to the Memorandum presented by the Bolivian Minister of this capital, which is regarded as part of the protocol, the amount proposed as a settlement of the claim of Alsop & Company is, without calculating interest (sin computar intereses) eight hundred and thirty-five thousand Bolivianos, of twenty-pence, or nine hundred and fifty-four thousand, two hundred and eighty-five Chilean pesos.*

*"By article 3 of the protocol, the Government of Chile, in order to settle the definite amounts to be paid, shall take into account the origin of the claims allowed (en origin de cada credito) as well as the data furnished by the Bolivian Minister in his memorandum.*

*"It is hoped that the Protocol will be approved by the Bolivian Congress, which is now in session, in a few weeks. The Chilean Government cannot take up the question of the payment of the claims until this protocol has been approved and promulgated."<sup>c</sup>*

<sup>a</sup> I Appendix, p. 64.

<sup>b</sup> I Appendix, p. 61.

<sup>c</sup> I Appendix, p. 67.

Under date of October 13, 1897, the Minister of Foreign Relations in a communication to the American Minister at Santiago stated:

*"Chile, by the treaty of peace with Bolivia of May 18, 1895, bound herself to satisfy various credits pending against the Government of Bolivia, amongst which was that of the house of Alsop & Co."*<sup>a</sup>

Under date of October 27, 1903, in answer to a communication from his Government, the American Minister at Santiago wrote the Department as follows:

"I have the honor to acknowledge the receipt of the Department's No. 247, asking to be advised of the truth of the report, that the pending negotiations between Chile and Bolivia have been broken off, or postponed indefinitely, owing to the unwillingness on the part of Chile to assume all that is demanded by Bolivia in the way of indemnity.

"The report which reached the Department is not based upon facts. The negotiations are still proceeding, with every prospect of satisfactory exit, and I was advised, no longer ago than three days, by the Minister of Foreign Relations, that he would soon be in a position to make a cash offer to the claimants of Alsop and Company, in satisfaction of this long pending claim. The Minister informed me that he would make the tender directly to me, and that if the same was not accepted, the amount tendered would be handed over to Bolivia, and the Alsop creditors, together with such others as might decline to accept a direct cash settlement with Chile, would be remanded to La Paz for the consideration of the Bolivian Government.

"Whenever such tender is made, I will communicate with the Department by telegraph, asking for authority from the Alsop claimants to make settlement."<sup>b</sup>

On December 4, 1903, the Department received a cable which embodied an offer made by the Chilean Minister of Foreign Relations on December 3rd to the following effect:

[Paraphrase.]

The Minister of Foreign Relations of Chile desires to know whether an offer of 954,285 Chilean pesos of 18 pence would be accepted in settlement of the Alsop claim, payment to be made at the option of the Chilean Government either in Chilean gold dollars of 18 pence, or in 5 per cent Chilean bonds, at the rate of 18 pence per Chilean dollar reduced to pounds sterling. Should the claimants decline this offer the Government of Chile will pay this sum in Chilean bonds to the Bolivian Government, which will then assume responsibility and settle with the claimants.<sup>b</sup>

On December 17, 1903, the Department informed its Legation that the Alsop claimants declined the offer as inadequate and it added that the Department was unable to recommend the accept-

<sup>a</sup> I Appendix, p. 70.

<sup>b</sup> I Appendix, p. 80.

ance of the sum and that it held the question of intervention under consideration.<sup>a</sup>

Under date of June 14, 1904, the Department was informed by its Minister at Santiago to the following effect:

[Paraphrase.]

*The Chilean Minister of Foreign Relations stated that the Chilean Government would become responsible for the settlement of the Alsop claim after and following the ratification of the definitive treaty of peace and amity between the Governments of Chile and Bolivia. The Minister also authorizes me to say that the treaty is assured and will be completed within three months, and that immediately thereafter he will take up the Alsop claim, giving it special, just, and even generous consideration.*<sup>b</sup>

On June 21, 1904, in a note addressed to the Minister of Foreign Relations of Chile, the American Minister used the following language:

"June 21st, 1904.

"MR. MINISTER: Upon the 13th inst., I had the honor to confer with Your Excellency relative to the Alsop claim, and expressed to you, after having submitted to your inspection the urgent telegram concerning the claim, just received from my Government, the pressing necessity for early consideration of this long pending obligation, and how greatly decisive action by Your Excellency's Government, would be appreciated by the Government of the United States.

"*Your Excellency's reply to the observations which I had the honor to make on this occasion was, briefly, that the Chilean Government had held, and continued to hold, the claim of Alsop and Company, as an obligation payable by the Chilean Government, contingent only upon the signing of the definite treaty of peace and amity with Bolivia, Your Excellency adding moreover, that this treaty would, without any doubt, be signed and ratified by the Governments of Bolivia and Chile, within the term of three months, and that I might consider myself authorized to convey information to this effect, to my Government. Continuing, Your Excellency was good enough to add, that immediately following the ratification of the treaty, the Chilean Government would address itself to the consideration of the Alsop claim, and out of deference to the expressed wish of the Government of the United States, and the necessitous condition of the claimants, would give to it, special, just, and even generous consideration.*

"Upon the same date of my interview with Your Excellency, I conveyed, by cablegram, to my Government, the substance of your statement, as recited above, and upon the 15th, I received the following reply:

"Express to Minister for Foreign Affairs the President's appreciation of assurances given and communicated by your cablegram. On this basis the Department is confident the matter will be satisfactorily adjusted at the period named."<sup>c</sup>

• <sup>a</sup> I Appendix, p. 81.

<sup>b</sup> I Appendix, p. 86.

<sup>c</sup> I Appendix, p. 88.

In acknowledging receipt of this communication, under date of July 2, 1904, the Minister of Foreign Relations of Chile used the following language:

*"In this respect, it corresponds to me to reiterate to your Excellency that the Alsop claim is included among the other claims weighing upon the Bolivian Coast, the payment of which will be assumed by Chile on the terms to be established in the respective treaty at the close of the negotiations at present going on towards that Object between the Governments of Chile and Bolivia. Only then will it be possible for the undersigned to give to the said Alsop claim the attention it deserves."*<sup>a</sup>

In December, 1904, the Government of Chile made a direct offer of settlement to the claimants of 524,333 Chilean pesos, and in connection therewith the Chilean Minister at Washington, on December 9, 1904, left with the Solicitor for the Department of State the following memorandum:

[Translation.]

"DEBTS OF BOLIVIA."

"Bonds of the loan for the construction of a railway in Mejillones. . . .	2190000
"Alsop claim . . . . .	835000
"Meiggs " . . . . .	120000
"Garday " . . . . .	40000

"Total in the silver currency of Bolivia. . . . . 3185000

"for the satisfaction of which Chile offers to Bolivia to deliver 2000000 Gold pesos of Chile (18 pence to the peso) which would be distributed pro rata. 524333 Chilian pesos or 39325 pounds sterling would go to the Alsop claim."<sup>b</sup>

The Department declined to urge the acceptance of the proposed sum.<sup>b</sup>

On January 30, 1905, the Chilean Minister at Washington, Señor J. Walker Martinez, in a communication addressed to the Secretary of State of the United States, states that—

*"In 1876 the Government of Bolivia recognized Alsop & Co. as assigns of Lopez Gama and granted them certain concessions.*

\* \* \* \* \*

"Among the various liabilities assumed by Chile in the treaty of October, last, was that of applying two million pesos in Chilean gold to a pro rata settlement of the following group of claims against Bolivia.

	Bolivian.
"Bonds of the loan for the construction of the Mejillones Railway. . .	2,190,000
"Claim of Alsop & Co. . . . .	835,000
"Meiggs claim . . . . .	120,000
"Garday claim . . . . .	400,000
"Pesos of Bolivia. . . . .	3,185,000

"All these claims are stated in their nominal amount in Bolivian pesos."<sup>c</sup>

<sup>a</sup> I Appendix, p. 90.

<sup>b</sup> I Appendix, p. 91.

<sup>c</sup> I Appendix, p. 92.

On August 1, 1907, the Chilean Government made a third offer this time offering 568,192 Chilean gold pesos.<sup>a</sup>

Under date of August 5, 1907, reporting an interview between himself and the Minister of Foreign Relations, the American Minister at Santiago said:

"Chile there (in the treaty of October 20, 1904) promised Bolivia to pay certain debts which had been contracted by Bolivia and which at the time were Bolivia's own."<sup>a</sup>

On April 9, 1908, in a note addressed by the Chilean Minister of Foreign Relations, a fourth offer was made for the settlement of this claim in the following words:

"My Government is ready to pay, in bonds, and in consideration of the total cancellation of said claim, the sum of 524,332.81 pesos gold of 18d. each as principal, and 78,649.92 pesos in gold coin at 18d. each as interest on coupons due thereon."<sup>b</sup>

The Department declined to accept this offer.

In the same note, the Chilean Minister of Foreign Relations used the following language:

"The treaty was signed on October 20, 1904, and in Article 5 it was stipulated that Chile should devote the sum of 2,000,000 pesos (dollars) gold of 18 pence each to the settlement of some of Bolivia's debts specified in said article. *Among them was the debt acknowledged in favor of Pedro López Gama, represented by the house of Alsop & Co., who acquired the rights of the former.*"<sup>c</sup>

It thus becomes clear from the foregoing correspondence that beginning with June, 1892, the Government of Chile has in its diplomatic correspondence with the Government of the United States repeatedly recognized the Wheelwright contract as a legal, valid, and existing obligation and has accompanied its statement of recognition thereof by promises to settle the same upon appropriate occasion; and that over and over again the Government of the United States has been assured that the debt due under the contract of 1876 would receive immediate consideration upon the conclusion of the treaty with Bolivia, which consideration, it was promised, would be "just and even generous."

<sup>a</sup> I Appendix, p. 108.

<sup>b</sup> I Appendix p. 142.

<sup>c</sup> I Appendix, p. 135.

### *Sub-Point C.*

C<sup>7</sup> The validity and binding effect of this contract have been recognized and approved by the Chilean courts in cases prosecuted by said Wheelwright before said courts, said cases involving and depending upon rights claimed by said Wheelwright under said contract.

### *Prefatory Summary.*

The courts of Chile have recognized the Wheelwright contract as binding and effective in the two principal cases brought by John Wheelwright to establish in the Chilean courts his rights under the contract of 1876 after the Bolivian Littoral passed under the control of the Government of Chile. These two cases were those of the *Justicia* and the *Amonita*.

### *Discussion.*

That the Wheelwright contract was a proper contract, entered into with due formality, and therefore legal and binding, was not only conceded, but stated by the courts of Chile in the case of the *Justicia*, the case in which Wheelwright sought to secure possession of the government estaca *Justicia*, which had been encroached upon by certain persons made parties to the suit.

In the course of the opinion rendered by the court of first instance in this case, that tribunal made the following statements:

"9. That, far from this, subsequent thereto, innumerable dispositions were dictated, which, as has been said in the fifth consideration, had for their object either to recognize and sanction the rights of instruction with respect to the estacas, or to regulate conveniently the exploitation thereof, it being fitting to note, in addition to those already indicated here, and, amongst others, the decrees of the 7th March, 29th May and 19th September, 1872, by which tenders were invited for the working of the estacas in conformity with the already cited laws of the 19th October, 1871, the order of the 13th February, 1874, in which notice is given to the Public Ministry to revindicate the estacas mines of the mineral district of Aullagas, the order of the 24th of the same month and year, which is given to the Attorney-General in order that he may take possession of the said estacas, the circular of the 21st April, 1874, which contains instructions for the same object and

with respect to the mining districts in general, and lastly, the contract celebrated by the Government of Bolivia with the plaintiff on the 23d December, 1876.

\* \* \* \* \*

"19. That the effectiveness of the said decree of the 23d July being proved, and that there belongs to Instruction the fourth or the third estaca, respectively, in continuation of those which may be measured to the discoverer of a lode in virgin or worked ground, it is fitting now to examine the validity of the contract celebrated between the plaintiff Wheelwright and the Government of Bolivia, a contract which gives rise to three questions which the defendants propound.

"(1) If that Government could celebrate the contract without infringing the treaties.

"(2) If the Laws of the Country authorized it for the celebration thereof, and

"(3) If Chili, as revindicator of this territory, ought or ought not to respect it.

"20. With respect to the first point that although it is certain that on the 13th February, 1874, the Government of Chili, by means of Consul Reyes, declared that it did not acknowledge nor accept on its part the contracts, settlements or arrangements which the Government of Bolivia might celebrate or accord, in so far as they may impose burdens on or effect the territory of common participation; it is also true that in virtue of subsequent negotiations, the treaty of the 6th August of the same year was signed between the two Republics, by which Chili renounced in favor of Bolivia, all her rights to the territory of the said common participation.

"21. That the high dominion belonging already to her over the territory, she could proceed, unencumbered, to the celebration of the contract with Wheelwright on the 23d and 24th December, 1876, in virtue of which she recognized to him, as representative of the house of Alsop & Company, the credit of eight hundred and thirty-five thousand Bolivian dollars, at the interest of five per cent. per annum, which was to be amortized, amongst other things, with forty per cent. of the product of all the estacas-mines of silver of the Coast Department, which were adjudicated to him for twenty-five years.

"22. With respect to the second point, namely, if the Government could celebrate contracts; that by the law of the 19th October, 1871, the Executive was authorized to celebrate contracts of letting or of working in partnership all the estacas-mines belonging to the State in the mineral districts of the Republic, and in conformity therewith, tenders were invited for the working of the said estacas by the decrees of the 2d November, 1871, 7th March, 29th May and 19th September, 1872, the whole concluding with the celebration of the contract with Wheelwright.

"23. That two years afterwards, on the 12th February, 1878 (fol. 118), the National Assembly approved the measures dictated in the Department of Finance by the Provisional Government inaugurated on the 4th May, 1876, excepting those which had been derogated or modified by express disposition thereof, amongst which the contract with Wheelwright does not appear."<sup>a</sup>

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<sup>a</sup> II Appendix, pp. 113-116.



In the court of second instance at Serena, the tribunal, while not considering specifically the question of the legality of this contract, accepted it and its binding effect without question and acted thereon, as is shown by the following extracts:

“Serena, 19th May, 1882.

“Reproducing the expository part of the sentence in first instance, and considering—

“1. That the convention celebrated in the City of La Paz on the 26th December, 1876, between the Government of the Republic of Bolivia and Mr. John Wheelwright, representative of the firm of Alsop and Company, is a contract of “anticresis,” by which convention there was recognized in favor of this firm a debt of eight hundred and thirty-five thousand Bolivian dollars, and there were adjudicated to him the estacas-mines of silver belonging to the State in the Coast Department, in order that the said debt should be paid with forty per cent. of their net products during the term of twenty-five years.

“2. That on that contract Wheelwright founds the demand of folio 1, in which he asks that the defendants may deliver up to him the part of ground of the Government estaca of the mine *Justicia* situated in the mineral district of Caracoles, which they have invaded.

“3. That from the act of measurement of the said mine *Justicia* executed on the 12th October, 1878, which is extended in attested copy at folio 6 of the added writing, it appears that the Government estaca was not measured on that lode, on account of the Deputy of Mining having so ordered it, in consequence of the ground which the said estaca should have occupied being in dispute.

“4. That it has not been shown that in the time elapsed since that day, the 12th October, 1878, until the date on which the district of Caracoles was reincorporated in the territory of the Republic of Chili, the said estaca should have been measured and the plaintiff put in possession of it.

“5. That from such antecedents it results that the said estaca did not have real and positive existence, nor in that which relates to it, did the said contract of the 26th December, 1876, have full effect while the district of Caracoles remained under the dominion of the Republic of Bolivia.

“6. That the plaintiff has asked that effect may be given to that contract celebrated in Bolivia and with the Government of that Republic, and supporting his claim on the privileges which the laws of that country conceded to the estacas mines called of Instruction when the territory in which the mine treated of it situated has returned to the dominion of the Republic of Chili.

“7. That the effects of the said contract, referring to an immovable property, situated to-day in Chili, ought to be arranged according to the laws of this country, inasmuch as the sovereignty is indivisible, and it would cease to be so in the present case if the district of Caracoles, which at present is a portion of Chilean territory, should be governed by laws emanated from another sovereign.

“8. That the admission of the demand, by ordering the measurement and delivery of the estaca claimed, would not mean in reality the mere recognition of a right definitely constituted beforehand, but

a mandate to the effect that a right should now be constituted in virtue of laws which ought not to rule in any part of the Republic, nor serve as a basis for the decisions of its tribunals.

"9. That the estaca which the plaintiff claims in virtue of his contract of "anticresis" not having been delivered to him in the time of the Bolivian dominion in Caracoles, and such contract not being perfected except by the tradition of immovable property, that convention remained without effect with respect to the said estaca.

"In conformity with these bases, and with that which is determined in the 16th and 2437th articles of the Civil Code, and in the 1st Law, 14th title, 3d paragraph. It is declared that the demand of folio 1 is without foundation. Let the sentence appealed from of the 14th May of the past year, extended at folio 230, be repealed." <sup>a</sup>

It is thus evident that the courts of both first and second instance considered the Wheelwright contract as binding and operative in the case of the *Justicia*.

In the *Amonita* case (May, 1882), the contract of 1876 was likewise recognized as binding. The court in that case made upon this point the following statement:

"4. That the Convention celebrated on the 24th December, 1876, between the Bolivian Government and Mr. John Wheelwright, partner and representative of the mercantile house of Alsop and Company, according to the terms of the public deed, which is extended at folio 180, was a contract of "anticresis," in which the Government of Bolivia conceded to Mr. John Wheelwright the estacas of Instruction of the mines of what was then called the Littoral of the North, in order that, for the term of twenty-five years, he might pay himself with their products, the sum of eight hundred and thirty-five thousand Bolivian dollars, and the interest thereof, which the said Government acknowledged to owe him (Article 2435 of the Civil Code)." <sup>b</sup>

It is thus clear that the courts of Chile, so far as they have expressed themselves at all upon this subject, have considered the Wheelwright contract as negotiated and concluded with all due and legal formality and therefore as binding and effective.

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<sup>a</sup> II Appendix, p. 118

<sup>b</sup> II Appendix, p. 124.

*Sub-Point C.*

C<sup>s</sup> The validity and binding effect of the Wheelwright contract were distinctly recognized by the Government of Chile through its Agents before the United States and Chilean Claims Commission in 1901, at which time a specific promise was made to pay the debt arising under the contract.

In his argument before the United States and Chilean Claims Commission, created by the Convention of August 7, 1892, and revived by the Convention of May 24, 1897, in which he contended in support of a demurrer that the Alsop claim was not within the jurisdiction of the Commission as established by the Conventions above mentioned, and that therefore the claim should be dismissed, the Agent of the Government of Chile made the following statement, including the solemn assurances therein incorporated:

“As is stated in the claimant's brief, it is among the liabilities that the Government of Chile engaged to pay *for the account of Bolivia*. This explains exactly the situation of the claim. The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia toward the claimant; and in order to induce the Bolivian government to sign the definite treaty of peace which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and is its position to-day, and if Bolivia signs the treaty, the claim of Alsop & Company, as well as the other claims mentioned, will be promptly paid under the treaty engagement as a relief to Bolivia from the liabilities which that government has incurred and for the account of Bolivia.”<sup>a</sup>

The Government of the United States confidently submits that if there were in this case nothing more than this statement it would completely establish the binding effect and validity of this contract, and would fasten upon the Government of Chile the full responsibility of that Government to satisfy this claim, for its equitable value, the Government of the United States would possess a perfect obligation running from the Government of Chile to the Government of the United States for and in behalf of the claimants. In the statement thus solemnly made by the Agent of Chile before an international tribunal we have a full recognition of the legality of the debt, of the complete and unimpaired obligation of the

Government of Chile to pay it, and a full and solemn undertaking of Chile in Bolivia's stead and for her account to discharge this obligation among others recognized, said obligation to become absolutely binding upon the Government of Chile so soon as the two Governments should conclude the final treaty of peace then in process of negotiation. Thus these solemn assurances of the Government of Chile given before an international tribunal at a time when the Government of the United States was presenting to that tribunal for adjustment this and other claims which it had against the Government of Chile, constitute not only a recognition of the obligation, but also a promise to pay the same, which, under any and all theories of international comity and good faith, the Government of Chile is in honor bound to fulfill.

*Conclusion.*

It is therefore confidently submitted that whether tested by the authority of the Bolivian Executive to make the contract, or by the approval and ratification of the contract by the Bolivian Congress, or by the subsequent recognition of the contract by the Government of Bolivia by means of executive decrees, or by and in diplomatic correspondence between the Governments of Chile and of the United States, or by and in formal protocols and treaties between the Governments of Chile and Bolivia, which protocols and treaties provided in express terms for the liquidation of the debt recognized by this contract, or by the decisions of the courts of Chile, or by the formal declaration and undertaking of its agent—the contract between the Government of Bolivia and John Wheelwright dated December 26, 1876, must be regarded as a valid, legal, and binding instrument; and that this has been recognized by the Government of Chile in its diplomatic correspondence with the Governments of Bolivia and the United States, in its formal treaties and protocols with the Government of Bolivia, in the decisions of its courts, and finally in a solemn assurance given by the agent of the Government of Chile before an international arbitration tribunal.

## POINT II.

THE GOVERNMENT OF THE UNITED STATES FOR AND IN BEHALF OF THE CLAIMANTS, AMERICAN CITIZENS, ABOVE NAMED (THEIR HEIRS, ASSIGNS, REPRESENTATIVES, AND DEVISEES), ALLEGES, CONTENDS, AND MAINTAINS THAT THE GOVERNMENT OF BOLIVIA, BY AND THROUGH THE CONTRACT OF 1876, DULY, PROPERLY, AND LEGALLY GRANTED TO THE CONCESSIONARIES UNDER THAT CONTRACT, CERTAIN RIGHTS, TITLES, AND INTERESTS IN THE GOVERNMENT ESTACAS LOCATED IN THE BOLIVIAN LITTORAL, WHICH RIGHTS, TITLES, AND INTERESTS WERE IN THE NATURE OF AND CONSTITUTED A CONCESSIONARY GRANT ANALOGOUS TO A LEASEHOLD INTEREST, WHICH CONCESSIONARY GRANT WAS, UNDER THE CONTRACT, TO RUN FOR A TERM OF TWENTY-FIVE YEARS; THAT THE GOVERNMENT OF CHILE, UPON TAKING POSSESSION AND ASSUMING CONTROL OF THE BOLIVIAN LITTORAL, WRONGFULLY INTERFERED WITH AND CONFISCATED IN A MANNER CONTRARY TO THE WELL ESTABLISHED AND UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW CERTAIN OF THESE VESTED RIGHTS, TITLES, AND INTERESTS THUS GRANTED TO THE CONCESSIONARIES UNDER THE CONTRACT OF 1876; AND THAT FOR THIS WRONGFUL INTERFERENCE, DEPRIVATION, AND CONFISCATION, THE GOVERNMENT OF CHILE IS LIABLE IN TORT TO THE GOVERNMENT OF THE UNITED STATES, FOR AND IN BEHALF OF THE CLAIMANTS, ABOVE NAMED—AS IS CLEARLY AND DISTINCTLY ESTABLISHED BY THE FOLLOWING CONSIDERATIONS AND DISCUSSIONS:

The following are the provisions of the Wheelwright contract of December 26, 1876, upon which reliance is placed to establish the national grant of the said vested rights, titles, and interests:

*“Resolution of December 23, 1876.*

“MINISTRY OF FINANCE AND INDUSTRY,

*“La Paz, December 23, 1876.*

“In accordance with the compromise made this day it has been agreed by the Government in Cabinet Council with Mr. John Wheelwright, representative of the firm of Alsop and Company, that the operation of the Government mines which have been let out as a concession to said firm on the same date shall be subject to the following clauses and conditions:

“1. Mr. John Wheelwright shall have a period of three years within which to examine the Government silver mines and find the

necessary capital with which to put them into operation, it being his duty to take the necessary preliminary measures to this end as soon as possible. The mines shall remain at the disposal of the concessionary during these three years, and the Government shall enable it to gain actual possession thereof by giving the proper instructions to the authorities.

"2. By virtue of the concession which has been made to him the concessionary shall be entitled to organize joint stock companies for the operation of one or more claims, either on the coast or abroad; or else to conclude contracts with owners of adjacent mines in order to secure the most certain means of operating all or any of the said concessions which in the opinion of the concessionary or companies organized are profitable or will at least pay the cost of working them where veins are already discovered or may be discovered during the three years assigned in the first clause.

"3. The concessionaries may hire and employ in their mining work either foreign or native engineers, employees, or laborers, who shall, during the period for which they are hired, be exempt from all military services as well as every civil or municipal office, except in cases of necessity in order to preserve public order and peace.

"4. The concessionary or companies in charge of the work shall present semiannual balances, on the strength of which, together with the records of the books, the distribution shall be made of the net proceeds, 40 per cent being applied by the Government to the payment of the debt according to the terms agreed upon in the compromise of this date, and sixty per cent going to the petitioner.

"5. The Government shall appoint one or more agents to superintend the work performed, who shall be compensated out of the common funds of the enterprise.

"6. This contract shall last for 25 years, after which time, if there is any residue after paying off the Government's debt in accordance with the compromise, it shall be turned over to the Government.

"7. If, within the first three years or thereafter until the expiration of the 25 years mentioned in the foregoing article, any persons or companies should offer to operate one or more of the mines included in this contract, they may do so provided the present concessionary does not care to undertake the operation thereof and so states in writing to the Government, or else deliberately neglects to make such statement.

"8. The Supreme Government shall grant to the petitioner free of charge, during the continuance of this contract, such lands of the Government as may be necessary for the erection of his buildings and mining establishments. Let this be recorded.

"DAZA.

"OBLITAS.

"CARPIO.

"VILLEGAS.

"SALVATIERRA.<sup>a</sup>

*"Resolution of December 24, 1876.*

"MINISTRY OF FINANCE AND INDUSTRY,

*"La Paz, December 24, 1876.*

\* \* \* \* \*

"Third. All of the silver mines of the government in the department along the coast are hereby devoted to the payment of the said amortization for which purpose 40 per cent of the net profits shall be utilized, except in the mine known as "Flor del Desierto," concerning which provision is made in the ensuing article.

"Fourth. The aforesaid mine called "Flor del Desierto," together with one other of the government mines to be selected by the party concerned, are hereby devoted to the payment of the interest claimed as due, amounting to 170,000 bolivianos prior to December 18, 1875, and 70,000 bolivianos for the year now expiring. In the mine called "Flor del Desierto" the quota due the Government and applicable to the payment of this amortization shall be 50 per cent of the net proceeds, and in the other mine it shall be 40 per cent, as in the remaining mines granted. The surplus remaining after the payment of this interest shall be applicable to the amortization of the capital acknowledged as due, as provided in clause 3, it being a condition that if one or both of the concessions produce nothing or little, then this obligation and every claim to said interest due shall be finally canceled.

"Fifth. The operation of the mines of the Government let as concessions in the foregoing article shall be subject to the contract concluded on this date on the subject, the interested party being permitted to assign these rights and this compromise to such persons or companies as he may deem suitable, giving the notice thereof to the Government." <sup>a</sup>

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<sup>a</sup> I Appendix, p. 9.

### *Sub-Point A.*

The estacas of instruction had under Bolivian law a due, proper, and legal existence and the Executive of Bolivia was duly, properly, and legally authorized and empowered to grant such rights, titles, and interests as were granted to Wheelwright under the contract of December, 1876, and this conclusion is undisturbed by the Chilean contention regarding "revindication."

### *Prefatory Summary.*

The discussion below fully establishes that the government estacas had a legal existence. This is shown, first, by the fact that it was under the Spanish mining law a long and well recognized right of the Sovereign to have set apart for him a royal mine next following those of the discoverer. This appears from Law XI, Title XXVIII, III, Partidas (1263); the Pragmatica of Don Alonzo XI, 1383; the Recopilacion de Castille, Don Phillip II (1553); and the Laws of the Indies Book VIII, Title XI, Law II (Don Phillip II at Madrid, May 26, 1873; at El Pardo, Oct. 17, 1575; Don Phillip III at Madrid, Feb. 6, 1613). These provisions became incorporated in the mining law of the Spanish colonies, and so became part of the mining law which was in force in Bolivia at the time that country became independent. See Introduction, p. XXIII "Le Nueva Legislacion de Minas de la República de Bolivia."

See also the work of Jorje Rodriguez Cerda, entitled "The Estacas of Education of the Government of Bolivia." The Supreme Court of Bolivia has traced out the history of the government estacas in this same manner.

Moreover, the decree of July 23, 1852, which has been variously considered as practically codifying existing law or as creating the law regarding government estacas, has been pronounced constitutional by the Supreme Court of Bolivia and under that and various supplemental decrees, the Executive of Bolivia had ample authority to make the Wheelwright contract.

The legal existence of these estacas in the Bolivian Littoral was in no wise effected by the contention of Chile, that in assuming



possession of the Littoral in 1879 it merely "revindicated" that territory, because it is evident from the early history of the Spanish colonies and the application thereto of the doctrine of *Uti possidetis* of 1810; from the constitutions of the Republic of Chile of 1822, 1823, 1828, and 1833, which latter constitution appears to have been in force until 1887-88; from a formal public treaty negotiated in 1844 between the Republic of Chile and the Government of Spain; from the treaties of 1866 and 1874 with Bolivia; and finally from the writings of various authors of recognized standing and repute—that this contention as to "revindication" is not well-founded in fact or in law; and moreover, even if it were well-founded, yet the rights of Bolivia in the littoral under the treaties of 1866 and 1874 was such as adequately to authorize that government either as a *de jure* or *de facto* government to enter into the Wheelwright contract of 1876 in such a way as to make that contract binding upon the Government succeeding to the sovereignty of the Littoral.

#### *Discussion.*

*Origin of the Government Estaca.—Early Laws.*—The policy of the Spanish law, so far as it affects the question under discussion, was in general terms announced and defined in Partida (1263, III, Title XXVIII, Law XI.), in which, in discussing "In what things Emperors and Kings properly have seignior," it was laid down that—

"The revenues of ports, and the port duties (portadgos) which the merchants pay for the things which they export and import, and the rents of salt-works (salinas) or of fisheries, and of iron works (ferre-rias,) and of other metals, and the taxes and tribute (pechos y tributos) which individuals pay, belong to the emperors and kings; and all these things were tacitly granted (otorgadas) to them in order that they might have wherewith to maintain themselves with dignity in their expenditures; and wherewith to protect their lands and their kingdoms, and to carry on war against the enemies of the faith; and in order that they might exempt their people from paying to them heavy taxes, and from other grievous burthens." (Hallack's Mining Laws of Spain and Mexico, p. 3.)

In the Pragmatica of Don Alonzo XI, 1383, the same subject is dealt with as follows:

*"Right of the Kings in mines of gold, silver, and other metals, salt waters and springs; and prohibition to work them without a royal license.*

"All Mines of silver, and gold, and lead, and of any other metal whatever, of whatsoever kind it may be, in our Royal Seignory, shall belong to us; therefore, no one shall presume to work them without

our special license and command; and also the salt springs, basins, and wells, which are for making salt, shall belong to us; wherefore, we command that they revert to us with the produce of the whole thereof; and that no one presume to intermeddle therein except those to whom the former kings, our predecessors, or we ourself may have given them as a privilege, or who may have held them from time immemorial." (Op. cit., p. 4.)

In the *Recopilacion de Castilla*, of Don Phillip II (March 18, 1553),—denominated by Gamboa "The Old Code," it was provided in Article 22 as follows:

"ART. 22. Also, we ordain and command, that any person who shall have discovered, or who shall discover, a new Mine, and shall have made registry as directed in the preceding ordinance, shall enjoy a space of one hundred and twenty *varas* in length upon the vein, and sixty in width; and if he should wish to measure out the said space of one hundred and twenty *varas*, and sixty *varas*, across the vein, he shall be at liberty to do so, and he may do it in such manner as to him may appear expedient; provided that he does not leave the fixed stake, and it shall be without injury to any other person, or persons, who may be on either side of him, and who may hold Mines opened and registered before him; and that, at the stakes of each first discoverer, one Mine to be left for us of the same dimensions as his own; and provided, that in the staking out and altering of boundaries, and in all else, there be observed in the Mine, or Mines, which they shall leave, and mark out to us, all the provisions of these ordinances, in the same way and manner as they are to be observed and complied with by all persons who shall take and shall have Mines; and those who, after the first discoverer, shall have taken Mines, or who shall hereafter take them, respecting such Mine which for us is to be left at the stakes of said first discoverer, may proceed to take and work their Mines; and each of the Mines taken after the said first discoverer has taken his, and ours has been taken, shall be one hundred *varas* long and fifty wide, which space they may take across the vein, or as to them shall seem best, provided they do not leave the fixed stake, and do not prejudice a third party." (Op. cit., p. 25.)

It was provided in the "Laws of the Indies," Book VIII, Title XI, Law II (Don Phillip II at Madrid, May 26, 1573; at El Pardo, October 17th, 1575; Don Phillip III, at Madrid, February 6th, 1613):

"That the Mines of the King may be worked, leased, or sold, as may be most expedient.

"We grant to the Viceroy and Praetorial Presidents power and authority, if they consider that any of our Mines of silver, gold or quicksilver, discovered in their districts, cannot be conveniently worked on our account, and that it will be more advantageous expedient and profitable to lease or sell them, to so lease or sell them, as may be most advantageous and beneficial to our Royal treasury. And inasmuch as there are other Mines which belong to us and are

not worked, although very rich, and from which, if they were leased or sold, we might derive profit, and as it will be well that some suitable means be adopted for this purpose:—We command the Viceroy and Presidents, that, having informed themselves of the quality and richness of each one, they proceed to work, lease or sell them, as may best promote the increase of our Royal Treasury, and that they render an account of the whole to the Council of the Indies.” (Op. cit. 164.)

It will be observed from the above that certainly beginning with the Ordinances of 1563—“The Old Code”—it was the law of Spain and of her dominions generally that adjoining every mine which should be discovered and marked out by any private person there should be located another mine belonging to the King. This law, as has just been pointed out, was included and made a part of the Ordinances of Peru, and these latter ordinances, together with certain portions of the codes applying to Mexico, and to the Spanish dominions generally, constituted the mining law of Bolivia at the time Bolivia separated herself from the mother country and continued to be the law of Bolivia from that time until August, 1852, with the exception of the period from 1835 to 1836, during which time a special code was in force in that country.

*Opinions of Commentators.*—The sources and antecedents of the Mining law of Bolivia are set forth as follows in an introductory essay in Dr. Melquiades Loaiza’s work “Le Nueva Legislacion de Minas de la República de Bolivia,” XXIII:

“The Ordinance of 1584, which was also called the ‘Ordinance of the New Pamphlet,’ was ordered to be observed in the Indias, as is shown by Book IV of the *Recopilación de Indias*, without prejudice to the local laws of Peru, which, collected in a Volume with others of different subjects, formed Book III of the Ordinance of Peru; so that all these laws concerning mines were in force in the Indias.

“Said Ordinances of Peru consist,—

“I. Of the compilation of the ordinances of mines and mining of Peru, which is composed of those issued by the Viceroy Don Francisco de Toledo, at La Plata, February 7, 1574.

“II. Of those issued by the Viceroy Don García Hurtado de Mendoza, Marquis de Cañete, on March 1, 1593.

“III. Of the ordinances, additions and amendments which Licenciado don Juan Díaz Lupidana, a Judge of the Audiencia of La Plata, Magistrate of Charcas, and Visitor General of Mines and Mining, under commission of the Viceroy Don Luis de Velasco, made on June 2, 1598, to the ordinances of the Marquis de Cañete, which the Ordinances 15 of Lupidana, Title 13, together with those of the Viceroy his successors approved and confirmed in relation to everything not in conflict with those made by him (Lupidana): the approving order is dated August 31, 1599, at Ciudad de los Reyes.

“IV. Of those which, as has been said, the same Viceroy Velasco made concerning the Petition for and registration of any mines what-

soever by reason of abandonment dated at Los Reyes, April 30, 1632, the order of July 19, 1603 being pertinent.

"V. Of any other provisions of the subsequent Viceroys, such as Ordinance 17, Title VII, dated August 18, 1623, and Ordinance 18 of the same title, dated March 18, 1684: in fine,

"VI. All other Royal Cédulas confirmatory of the privileges and ordinances of the miners which come down as late as 1680.

"The compilation was made by Licenciado don Tomás Ballesteros by order of the Viceroy, the Duke de La Plata, Melchor de Navarro y Rocafull, having been published in Lima, by don Joseph de Contreras in the year 1685.

"In New Spain, in the meantime, only the ordinances of Castile were observed; but as it was afterwards seen that they were insufficient to cover the new minerals, a careful reform thereof was undertaken which was given out in a pamphlet destined particularly for Mexico, with an order that it be adopted in Peru and Chile in so far as might be possible, through its pertinent declarations and repealing the ordinances of Peru in so far as they were in conflict therewith and with regard to matters concerning which this pamphlet made provision.

"Don Francisco Javier de Gamboa, who had conducted in the Audiencia de Mexico the famous suits concerning mines, is the commentator of the Ordinances of New Spain. His work which has been of so much service to us to illustrate our comments was published in Madrid in the year 1761. Not only does he take care to make a learned and clear explanation of the laws, but he also treats concerning ownership and measurements of mines and puts in a clear light documents referring thereto. He makes, moreover, an explanation, although brief, of the Ordinance of Peru which because they have not been issued in a codified form we have had to cite with reference to the extract from Escalona in the *Gazofilacio* and to Garcia Calderón in his *Dictionary of Peruvian Legislation*, following in a few instances the citations of Gamboa and Cobo.

"The Ordinances of Mexico and Peru were in force in Bolivia until November 13, 1834, the date on which the Mining Code sanctioned by Congress in that year was promulgated. Very soon its improprieties and defects were noted, wherefore its force was suspended on October 5, 1846, a commission being named to formulate a new Code. In the meantime and as the law of November 11, 1839, afterwards provided, the old Ordinances came again to be in force.

"A new project having been published in the periodical *El Calaje* of Potosí, the national convention by law of October 6, 1851, authorized the Government to promulgate it having first obtained the report of the Supreme Court of Justice. The modifications which seemed proper in the judgment of that Tribunal having been made, and those which the Government suggested having been considered, it was put into effect by the law of September 10, 1852, having repealed the Ordinances in conflict with it."

Later in his work, Dr. Loaiza, in commenting upon article 37 of the Mining Code of 1880, says:

"The *estaca* mines of the State date from the colonial epoch. In New Spain (Mexico) Ordinance 14 of the '*Nuevo Cuaderno*' which

corrected old ordinance 22, directed that there be designated to His Majesty one mine next following that of the discoverer; but Gamboa, together with Jose de Saenz, feels that it fell into disuse because of the difficulties and obstacles of a varied nature (See paragraph N of No. 7 of Article 1 of this law).<sup>a</sup> In Peru, the ordinances which designate an estaca for the King, were in full force, as Escalona states in his "Gazofilacio", pages 103 and 112.

"Nevertheless, Escalona himself (page 104) calls attention to the propriety of the sale of said mine supported by reasons worthy of serious consideration; and in a cedula of the Viceroy, Don Francisco de Toledo, of October 17, 1575, said sale at Public auction was suggested."

The source and antecedents of the mining law of Bolivia have also been discussed by Enrique Mallea Balboa in the introduction to his work "*La Legislación Minera*" (p. ix), in which that learned author has set forth the following facts:

"The Ordinances of 1584, known as the ordinance of the 'Nuevo Cuaderno'; The Ordinances of Peru, consisting of various orders promulgated by the several viceroys; and the Ordinances of Mexico, the observance of which in Peru was ordered by means of their respective 'declarations'.

"These, briefly stated, were the Spanish and colonial laws that obtained in Peru. When the Republic of Bolivia declared itself free and independent, it lost no time in framing its own legislation in every branch of the law.

"The Ordinances of Mexico and Peru, nevertheless, prevailed until 1834, when the defective code of mining, which remained in force only until 1836, was promulgated. The old ordinances, which were declared to be in force by the law of November 11, 1839, were observed until 1852 when a new code, which was in operation until 1880 and has remained in operation as affecting the old concessions, was promulgated."

In a careful and learned essay by Jorje Rodriquez Cerda upon "The Estacas of Education of the Government of Bolivia"—written with special reference to the question "Is the Government of Chile by the fact of conquest and revindication bound to respect the contract which the North American citizen, John Wheelwright, made with the Government of Bolivia concerning the exploitation of said estacas?"—the writer quotes, with the introduction and

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<sup>a</sup> ARTICLE N: To which is added the mine (of 60 varas in those of silver and 50 in those of gold) which must be reserved for His Majesty together with the mine of the discoverer, the latter swearing that it is amongst the richest in accordance with the ordinances of Peru which conform to the ancient ordinances of Castilla, although it is better to sell it or rent it, as is provided, because of the fact that the ore is of a low grade; and although in New Spain this designation of a mine for His Majesty is not put into practice, nevertheless, a fifth or a tenth, which is the recognition of the Sovereign, is paid, establishing the fact that in their origin all metals belong to the Royal patrimony. (Loaiza's note.)

comment given below, the words of Don Pedro Nolasco Cobo as follows :

“The beginning of mining legislation,” says Don Pedro Nolasco Cobo, in his *Manual of Mining* published in 1854, ‘does not antedate the second half of the 14th century, but from its origin to the present, it has continued to follow, step by step, the development of ideas and progress, shaping itself to the new circumstances and disentangling the innumerable difficulties which each day the interest occasions.

“In fact, the most ancient monuments which we have upon this subject in our legislation belong to the edict of Alcalá (*Ordenamiento de Alcalá*), published in the year 1348. Laws 47 and 48 of Title 32 of this Code declared that all the mines of silver, gold, lead, or any other metal as well as the deposits, springs and wells of salt water, belong to the royal domain and they forbade, therefore, that they should be worked without the permission of the Sovereign.

“Before this time, in the judgment of the Spanish historians, mineral riches must have followed the feudal condition of the land wherein they were found, and belonged, if they were in freeholds, to the proprietor, or otherwise to the feudal owner; since although in Spain the feudal system will not be found with all its characteristics as it is in other European nations, it cannot be denied that it existed in a clear and determined manner. The exploitation of the rich mines of Iberia, the important subject matter of the codification of the Cartagenian and Roman conquerors, up to that time have been limited to a very narrow scope since no trace is to be found of their existence during such a long period and since the different codes and laws successively promulgated do not treat of them either in the assignment of the rights to which they might give rise or even in determining, as did the later ones, and the ancient Roman law, the portion of their proceeds which had to be paid in to the Treasury of the monarch.

“In the wise Code of the ‘*Partidas*’ we find scarcely one disposition more than the other made to declare either the inalienability of the sovereign’s ownership over the mines or the right which he had to the proceeds of the salt deposits and mines of iron or other metals.’” (Law 5, Title 15, Part 2.) (Law 11, Title 28, Part 3.)

“By the law which today is No. 2, of Title 18 of book 9 of the ‘*Novísima Recopilación*,’ King John the First in 1787 granted to the temporary and permanent inhabitants of the Kingdom, the right to search for, to examine and to excavate mines of gold, silver, mercury, tin, stones and other metals in their own land and in those belonging to others with the permission of the owner, provided always that they be obliged to give to the crown two-thirds of what they might extract, after the payment of expenses.

“But such a disposition which, taking into account the state of those communities, was really intended to give impetus to the industry, could not produce in practice the good results which were expected of it; either by resistance of the Nobles, owners of the territorial riches, opposed to everything which in their judgment could damage their interests, or (if we are to believe the preamble of

the law 3, Title 18, Book 9, of the Novísima Recopilación), because of the prodigality itself of the monarchs.

“It was necessary that the energetic and incomparable will of Phillip II should come to reincorporate by new provisions all the mines under the ownership of the crown, not for the purpose of exploiting them on account of the latter, but in order that private individuals and even strangers might discover and work them.

“This king at various times concerned himself for the interests of the mining industry regarding special methods of acquiring private ownership in mines, and of the manner of working them after they had been incorporated into the crown, there to guarantee the enjoyment of this ownership, to better the former governing disposition, and to create special judges and tribunals who should see to the precise fulfillment of these dispositions, or finally, to fill the omissions and amend the defects of the former owners, going so far as to grant to this important industry the benefit of the special legislation.

“He endeavored not only to overcome the resistance of the possessors of the territorial wealth, but also to stimulate the mining industry and to foment therein a not inconsiderable source of fiscal revenue.

“Thus it is that these laws defined the taxes and the imposts with which, in accordance with the quality of the mines and of the works to which they should give rise, they had to contribute to the crown; they established the necessity of a registry, excavation and possession in order to fix the priority, the bases of the right of property; they provided rules for the exploitation and they imposed against those who did not observe them penalties which were so severe as to entail forfeiture; they prescribed the manner in which the mines had to be staked or marked and their dimensions; they conceded to the miners the right of making use of the public and municipal pastures and woods; and finally, they prescribed that in case of litigation, the possessor should continue working the mine and render an account of its proceeds.’

“All these laws, which at the beginning were enacted only for Spain, were made operative in America by Law 3, Title I, Book 2 of the ‘Recopilacion de Indias.’ So that when they were incorporated by the orders of Phillip II, they were granted to his subjects resident upon the new continent under stated conditions.

“One of these conditions was that which Ordinance 12, Title I, of the Ordinances of Peru, had created in favor of the crown and which was situated between the ‘Descubridora’ and the ‘Salteada’ which were the first and second claims of the discoverer and which remained in force when the laws of the Metropolis were ordered to be executed in America.

“Later, when the observance in the Vice-Royalty of Peru was ordered of the mining ordinances of New Spain, for by the royal order of December 8, 1785, there was expressly ratified in the 32nd declaration, the existence of the estaca reserved to the King by ordinance 18 of those of Peru, with the only difference that it was marked as next following those of the discoverer.

“This right, created in favor of the crown, continued until the monarch himself renounced it by royal cedula of December 10, 1791,

for the benefit of the discoverers as a reward for their constancy and labor to serve as a stimulus to new discoveries.

"From that time, the reserve created in favor of the crown remained forever repealed, and continued only for the benefit of the discoverers, until the independence of Bolivia having been proclaimed, the ancient ordinances especially those of Mexico applied to Peru, were declared to be in force by the Supreme order of August 5, 1829. So that at the date of the decree of 1852 they were only allowed to the discoverers the claims which articles 1 and 2 of Title 6 of the ordinances of New Spain conceded to them."

Finally, it may be observed that the Supreme Court of Bolivia, in passing upon the question of the constitutionality of the decree of July 23, 1852, traced out the history of the government *estaca* in substantially the same way.<sup>a</sup>

*Law of Bolivia.*—It would seem from the above discussions that while the Decree of July 23, 1852, may be properly considered as a codified expression of the existing law, it was nevertheless perhaps the first express Bolivian statutory enactment upon the matter. The decree reads as follows:

[Taken from "Coleccion Oficial de Leyes, Decretos, Ordens, &c.," for 1852.]

*"Decree of the 23d July, 1852.*

"The Constitutional President of the Republic, considering:

"1. That, according to the principles of universal Jurisprudence and the existing Statutes of the Republic, every description of metallic lode found in the territory of the nation belongs to the dominion of the State, not conceding to the discoverers thereof more than three interests or '*estacas*,' and the rest remaining public property.

"2. That the want of funds of Instruction to fulfil its important and varied requirements, and the failure of some of its branches of income, impose on the Government the duty of searching for means of adjusting both without having recourse to the increase of taxes, ever prejudicial to the citizens.

"DECREES.

"ARTICLE 1. In every mine, or lode of silver, gold, or other metal whatsoever, the interest or '*estaca*' following those which may correspond to the discoverer or denouncer, according to the existing statutes, is applied of full right to the Treasury of Public Instruction.

"2. The administrators of these funds in the Capitals of Departments and the Governors in the Provinces shall take possession of the said *estaca*, giving account to the Prefect of the Department, and the latter to the Government, of the number and quantity of *estacas* adjudicated to the Department.

"3. In consideration of the advantages which the sale or lease of the *estaca* might produce in favor of the funds of Public Instruction, the Government shall cause it to be sold or rented, in accordance with the formalities established by law.

<sup>a</sup> I Appendix, p. 348.



"4. Only the administration of the proceeds of the adjudicated estaca belongs to the respective departmental Treasury, the Government reserving to itself, in consideration of the national derivation thereof, the right of applying them or expending them on the Establishments of Public Instruction of the Department that it may judge most convenient.

"5. This decree shall be submitted to the next Legislative Chambers.

"Let it be printed, published and circulated.

"Given in the Palace of Government, in the illustrious and heroic Capital, Sucre, the 23d July, 1852, the 44th of the Independence and 4th of Liberty.

"MANUEL ISIDORO BELZU,

"(Signed.) RAFAEL BUSTILLO,

"*Minister of Public Instruction and Foreign Relations.*"<sup>a</sup>.

In view of what has been already set forth above regarding the origin of this law, its antiquity and at one time all but universal recognition in Spanish countries, it seems unnecessary to dwell upon the legality of the decree, further than to quote the judgment of the Supreme Court of Bolivia which, on October 28, 1872, pronounced the decree both effective and constitutional.

"Considering the complaint filed by Don José Santos Munoz Chavez concerning the unconstitutionality of the decree of July 23, 1852, and the answer of the Attorney General which opposes it, because there has not been raised in conformity with Article 82 of the Constitution and 7 of the Law of Judicial Organization (of 1857), any concrete question that must be decided by applying or not applying the decree alleged to be unconstitutional;

"Considering the amendment of the complaint so as to request the adjudication of the government estaca mine upon the vein of Cibelos Cut by the tunnel of San Bartolomé in the mineral district of Aullagas which was refused because of said decree which is now alleged to be unconstitutional and, furthermore, as having been repealed; and the answer of the Government Attorney insisting upon the want of foundation of the complaint, and asserting the constitutionality and existence of said decree;

"Considering the annexed record in which appears the petition that Chavez made for the adjudication of said estaca, the opposition of the Minister of Public Works in representation of the Treasury interests and the order denying the same, issued by the Sub-Prefect of Chayanta; and

"Considering that the functions of the Prefects and Sub-Prefects, when they intervene in conformity with Article 70, 323, and others of the Code of Mines in the registries and concessions of claims because of discovery, or in the allotment of mines, because of denouncements founded upon abandonment or others, are of a purely administrative nature, and are not immediately subjected except to the examination and criticism of their respective superiors in the administrative departments; but that when said authorities,

exercising the aforesaid functions, injure private rights or interests guaranteed by the law or by any title whatsoever, and provoke claims, or when the claim of a petitioner for mines which has been submitted to them, gives rise to the opposition of third persons, their jurisdiction ceases and that of the tribunals of justice commences in conformity with Articles 2 of the law of September 30, 1871, and 333 of the aforesaid Code, without necessity of taking an appeal to the administrative superior; that, therefore, the Prefects and Sub-Prefects cannot, without committing an excess of jurisdiction, decide the controversies of a contentious character which may come before them because they fall within the jurisdiction of the ordinary tribunals; Considering, as a fact, that the petition of Don Jose Santos Munoz Chavez for the adjudication of an estaca in the vein of Cibelos was answered by the Government Attorney, Dr. Estivaris, who, in representation of the public interest, opposed the concession maintaining that the estaca requested belonged to the State, that from that moment the question became a judicial one as it continues to be up to the present; Considering that Articles 82 of the Constitution and 7 of the Organic Law of the courts, confer upon the Supreme Court the power to decide matters of pure law, the decision whereof depended upon the constitutionality or the unconstitutionality of the laws; that neither the aforesaid articles nor any provision gives jurisdiction over such matters to the lower tribunals of the first and second instance, so that the Supreme Court only intervenes in an appeal with regard to their nullity as it does in common lawsuits; that on the contrary said articles constitute a sole and exclusive attribute of the Supreme Court in order to guarantee the constitutional order; that the necessary submission to the examination and decision of the lower courts of matters which cannot be decided without involving the respect for the Constitution and legislative order would entail the division with them of a high political function which is peculiar to it, and even enable the interested parties to prescind from its intervention, obeying the judgments of the first and second instance; Considering, therefore, that in the complaints concerning the adjudication of mineral interests when they have been encumbered by the opposition of the Ministry of Public Works or of any person, and have been converted into a contentious administration or judicial discussions which must be decided in accordance with a law whose unconstitutionality is alleged, they may be legally instituted before this court without previous decision of the Superintendent of Mines or of the Supreme Government and without the intervention, in turn, of the lower courts of justice in accordance with their scale of jurisdiction; It is DECLARED that the complaint of Don José Santos Munoz Chavez has been made in conformity with the laws before mentioned. Considering, on the other hand, that although Articles 82 of the Constitution and 7 of the Organic Law appear to textually provide the case in which the unconstitutionality of the law may alone be discussed, since they confer jurisdiction over the lawsuit upon its merits for its first and final decision exclusively upon the Supreme Court, the latter must, in conformity with the spirit of said articles, decide also all the questions of law intimately connected with the complaint and therefore could not, without changing the nature of an indi-

visible action, refrain from deciding, in fact, the existence or repeal of the decree of July 23, proposed in a complex manner and which is inseparable from the question of its unconstitutionality; Considering, in fact, that the mineral deposits of the Indies, incorporated into the patrimony of the Kings as royal perquisites of the crown, by law 3, Title 18, Book 9, of the 'Novísima Recopilación' were granted to their vassals in property and possession in the terms and without other conditions than those indicated in Chapter 2, Second Ordinance of those of Mexico; but that such privilege did not repeal the restriction established by Ordinance 18, Title 1, of those of Peru in accordance with which in every registry, one claim must be reserved for the king, situated between the 'Descubridora' and the 'Salteada' which were the first and second of the person making the registry; Considering that when by the royal order of December 8, 1785, the observance was ordered in the Vice-Royalty of Peru of the Ordinances of Mines of New Spain, there was expressly ratified in the 32nd declaration the existence of the estaca reserved for the King by said Ordinance 18, with the sole modification that the latter must be designated next following the claims of the discoverer; Considering that the independence of the Republic having been proclaimed and up to 1852, mining continued under the jurisdiction of the same ordinances and especially those of Mexico, already adopted in Peru and declared to be in force in Bolivia by the Supreme Order of August 5, 1829; Considering that the promulgation of the Code of Santa Cruz, repealed on October 5, 1836 and replaced by said institutions which preceded it, did not introduce any permanent variation in the legislation concerning this department; Considering that no law of the Monarchy nor of the Republic has repealed said Ordinance 18 ratified by Declaration 32 of 1785; Considering that the State of Bolivia and its government having succeeded to the Kings of Spain in all their rights and perquisites inherent to the sovereignty because it had fully assumed its autonomy, the claims of which mention has been made which were reserved in the registries of veins, passed *ipso jure* to the dominion of the State, the latter continuing in possession of the right in expectancy of obtaining a claim in every discovery;

"Considering with regard to the unconstitutionality of the decree of July 23, 1852, issued during the time that Ordinance 18 and said Declaration were in force, that said decree, upon allotting to the Department of Public Instruction one estaca in each registry, did not explicitly provide anything regarding the Government estaca of which mention has been made; that such a silence, in conjunction with that which the other prior and subsequent laws preserve concerning the Government estaca, evidently shows that the said Decree did not create a new interest nor segregate a new allotment of those which were subject to the grants to individuals, having on the contrary, been reduced to implicitly ordering the application to Public Instruction of one claim which already belonged to the private property of the nation; Considering that in accordance with the principles of the Constitution and of the financial law of 1851, the Executive Power was not forbidden to meet the obligations of a branch of the public service with the rent of a private property of the State

which was not being used. Wherefore, inasmuch as there was no question of a legislative act but of an act purely and merely administrative, the fact of empowering agents of the national service in the branch of education to operate the Government *estacas* without withdrawing them from the Public domain, the Government of 1852 could, in exercise of its ordinary attributes, reestablish, as it substantially did, a reservation sanctioned by Ordinance 18 which had not been tacitly or expressly repealed, and to regulate its execution without affording a basis for qualifying such measures as unconstitutional.

“Considering that with regard to the repeal of the decree of July, 1852 by the subsequent dispositions, that the Code of Mines of 1852, sanctioning the principle of the radical ownership of the nation in all the mines, has granted to individuals, as did the ordinances of Peru and Mexico, the right to work them after obtaining a grant; Considering that none of the provisions of said Code expressly or tacitly abrogates Ordinance 18, nor the decree of July which put it into effect, and considering that the additional article, embracing only the ordinances, laws and decrees in opposition to the provisions of the Code, has no effect with regard to the aforesaid ordinances, not only because the Government *estaca* mine can exist without infringement upon the right which the Code gives to petition allotments which do not prejudice third parties who may have acquired them with priority, but also because in the same colonial legislation itself both rights have been coexistent as compatible, that is, the one reserved to the crown and the right of the concessionaries sanctioned by the terms of the ordinance; Considering, on the other hand, that a doubt, if any should exist, would disappear in the presence of the explicit ratification of the binding force of the decree of July, contained in the Dictatorial Circular of March 1, 1860, issued with the legislative power which that Government assumed whose laws are fulfilled and observed by the acceptance of the people as the laws are fulfilled which have emanated from the legislative body; Considering, upon this same point, that independently of the motives aforesaid, the consistent assembly of 1871, in the law of October 19, has provided for the working and the use by way of lease or co-partnership, of the *estacas* of the State; considering that such a provision would have had no object if the Mining Code had repealed the decree of July which put into effect the reservation of Ordinance 18 since the State does not possess in a permanent and known manner other mining interests than those reserved by the decree which is assailed.

“Considering, therefore, that on his part, Don José Santos Munoz Chavez has not justified his action proving the unconstitutionality or the repeal of the decree of July 23, 1852, and that the Ministry of Public Works has duly shown that said decree was constitutionally issued and is actually in force with regard to mines—

“The Supreme Court declares that the *estaca* mine prayed for by Don José Santos Munoz Chavez upon the vein of Cibelos, cut by the tunnel of San Bartolomé in the mining district of Aullagas, can not be granted him because it is a property of the State, recognized by the aforesaid laws. Having been registered, let it be filed.—Sucre, October 28, 1872.”<sup>a</sup>

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<sup>a</sup> I Appendix, p. 348.

It would however appear that, so far as the discussion of the present case is concerned, the question of the validity and existence of the decree of 1852 at the time the Wheelwright contract was concluded, has been finally determined in the affirmative by the finding of the court of first instance in the case of the *Justicia*. While the decision of this court of first instance in this case was reversed on appeal, the upper court expressly affirmed the findings of fact and law in the case other than those overruled, of which this latter was not one.

The court of first instance in the above mentioned case discussed the validity of the decree of 1852 in the following language:

“Considering: 1. That the decree of the 23rd July, 1852, in recognizing the dominion of the State over every description of metallic lode which might be found in its territory, enacted that ‘in every mine or lode of silver, gold or other metals whatsoever, the interest or estaca following those which may correspond to the discovery or denouncer, according to the existing statutes, is applied of full right to the Treasury of Public Instructions.’

“2. That the ordinances to which the decree refers, are no others than those of Mexico, those of Peru, and the ordinances of New Spain, whose observance was prescribed by the Royal Schedule of the 8th December, 1785, which expressly ratified, in the 32d declaration, the subsistence of the estaca reserved for the King by the 18th ordinance, 1st title of those of Peru, but this having to be measured after the setts of the discovery.

“3. That the independence of Bolivia being proclaimed, there was declared subsisting, by order of the 5th August, 1829, the old ordinances and especially those of Mexico already adopted by Peru, and which continued in force until the year 1852.

“4. That, according to this, the decree of the 23d July, of this year, enacted nothing new respecting the interest which in every mine belong to the State as successor of the Crown; it only determined to what branch of the service the product should be applied,

“5. That, although in the pleadings there is no evidence that the said decree would be submitted immediately to the approval of the Legislative Chambers, as is ordered therein, there have been published, after it, various dispositions embodied in laws, decrees, orders and dispositions, which recognize and sanction the legal existence of the estacas destined to public instruction, and regulate their exploitation, as, amongst others are the circular of the 21st May, 1860, which ordered that the decree of the 23d July should be made effective, the decree of the 29th September and 9th October, 1871, respecting the estacas belonging to the State, the law of the 12th of the same month and year declaring the estacas of instruction to be imprescriptible, the law of the 19th October, of the said year, which empowers the executive to celebrate respecting same contracts of letting or for working them in partnership, the law of the 15th November, 1873, which directs that the Government may proceed to take possession of them, and many other dispositions which it would be tedious to enumerate.

"6. That the constitutionality of the decree being established, and consequently, the legal existence of the estacas of instruction, it is incumbent to know if the decree which recognized that existence has or has not been derogated by the Mining Code of Bolivia, promulgated on the 10th August, 1852.

"7. That the first article of the additional ones of the said code establishes that 'all law suits about mines shall be decided by the new code, all the other ordinances, laws, decrees and special regulations which may be opposed thereto remaining null and void.'

"8. That whatever may be the scope which may be given to this disposition, the derogation of the decree of the 23d July, 1852, will never be discovered in it, because the Code does not contain any disposition which may imply relation with the estacas of instruction, nor did it create a new interest in favor thereof nor suppress the existing one.

"9. That, far from this, subsequent thereto, innumerable dispositions were dictated, which, as has been said in the fifth consideration, had for their object either to recognize and sanction the rights of instruction with respect to the estacas, or to regulate conveniently the exploitation thereof, it being fitting to note, in addition to those already indicated here, and, amongst others, the decree of the 7th March, 29th May and 19th September, 1872, by which tenders were invited for the working of the estacas in conformity with the already cited laws of the 19th October, 1871, the order of the 13th February, 1874, in which notice is given to the Public Ministry to revindicate the estacas mines of the mineral district of Aullagas, the order of the 24th of the same month and year, which is given to the Attorney-General in order that he may take possession of the said estacas, the circular of the 21st April, 1874, which contains instructions for the same object and with respect to the mining districts in general, and lastly, the plaintiff on the 23rd December, 1876.

"10. That it is impossible to presume that, with reference to the decree of the 23d July, there should have been in the long space of time elapsed since 1852, so considerable a number of laws, gubernative dispositions and judicial decisions, if it had been derogated by the Mining Code.

"11. That the constitutionality of the decree referred to, and its actual obligation being established in virtue of the preceding considerations, it is necessary to ascertain, in succession, the estaca which corresponds to instruction, which, according to the defendants, would be only the fourth in continuation of the three which were measured to the discoverer."<sup>a</sup>

*Power and Authority of the Bolivian Executive.*—That this decree of 1852 was always considered as constitutional and operative, both before and after this judgment of the Supreme Court, and that under it the Bolivian Executive was fully authorized to negotiate and conclude the Wheelwright contract of 1876 have been, it is believed, already sufficiently discussed under Point I, Sub-

<sup>a</sup> II Appendix, p. 111-113.

Points A and B *supra*, to render unnecessary any further discussion of this point at this time.<sup>a</sup>

It is submitted that these various provisions of the law of the Spanish colonies and of Bolivia, as well as the commentaries on these various laws, sufficiently establish the fact that the Decree of July 23, 1852, was a constitutional decree and that it embodied in it principles which had formed a part of the mining law of Spain from a very early period. It is also evident from the note on this page that under this law numerous other decrees and laws have been passed for the purpose of carrying the provisions of the same into effect. It is submitted that no valid objection can be raised to the above conclusions.

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<sup>a</sup> It might however be noted by way of addition to what was said under Point I *supra* that in his essay regarding the Estaca-Mines of the Public Educational Fund of Bolivia, already referred to above, Jorje Rodriquez Cerda, lists the various laws, decrees and Executive acts promulgated by the authorities of Bolivia for the operation and enforcement of this decree, as follows:

"Year 1860.—A circular concerning the fulfillment which must be given to the decree of July 23.

"Year 1871.—The decree of September 29, upon the estacas belonging to the State.

"Year 1871.—The circular of October 9; explanations of the decree upon estacas of the State.

"Year 1871.—Resolution of October 12.—The estacas of the State are not subject to prescription.

"Year 1871.—The law of October 19.—General authorizations to promote the advance of the country. \* \* \* \* 5th: To enter into contracts for the renting or exploitation in partnership of all the estaca mines belonging to the State in the mining districts of the Republic.

"Year 1871.—The decree of November 2.—Estacas of the State.—An invitation to work them in partnership.

"Year 1872.—Decree of March 7.—The term is prolonged for the auction and working thereof.

"Year 1872.—Resolution of March 12.—Mining district of Aullágas.—The outside workings of the Company "Arteche."

"Year 1872.—Resolution of May 13.—The mineral district of Aullágas; a new commission for its measurement and delimitation.

"Year 1872.—Decree of May 29.—The auction called for by decree of November 2, 1871, and explained by that of March 7, last, for the working of them is extended until the first of the coming October.

"Year 1872.—The decree of September 19.—New bids are asked for their working.

"Year 1873.—The law of November 14.—They are sold at public auction.

"Year 1873.—The order of November 14.—Publication of the foregoing law and of the following one.

"Year 1873.—The law of November 15.—The Executive is ordered to take possession of them.

"Year 1874.—Order of February 13.—Aullágas.—Prohibitions against the Ministry of Public Works concerning the recovery of the estaca mines of the Treasury

*Revindication.*

(1) *The Contention of the Government of Chile.*—At this point it is perhaps well to dispose of a question to which it would appear the Government of Chile is not disinclined to attach some importance in connection with this case, namely, the apparent contention of the Government of Chile that the case is in some way affected by the theory which that Government has put forward concerning the alleged "*revindication*" of the Bolivian Littoral in which were located the mines granted to the concessionaries under their contract of 1876. From the statements made it would appear that the Government of Chile intends to put forth the claim that the Littoral always belonged to Chile as of right; that the possession of Bolivia from 1866 to 1879 was by virtue of Chile's sufferance, which found expression in the treaties of 1866 and 1874 as a cession of territory upon condition; and that this condition having been broken by Bolivia, the territory reverted in 1879 to Chile, its original owner.

Waiving for the present the question as to whether or not the rights of the concessionaries in this case would be in any wise

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Footnote—Continued.

"Year 1874.—Order of February 24.—Aullágas.—Authorization to the General Treasurer with regard to the taking possession of the fiscal estaca mines.

"Year 1874.—Resolution of March 10.—The time for arbitrating the Lopez Gama case is declared to have arrived.

"Year 1874.—Resolution of the 26th of March.—Aullágas.—The Government cannot modify nor revoke the decisions issued by the tribunals.

"Year 1874.—Circular of April 21.—Prohibitions concerning the taking possession of them.

"Year 1874.—Order of May 20.—The Prosecuting Attorney of the District of Cochabamba is named the defender of the State before the tribunal of arbitrators.

"Year 1874.—Resolution of May 20.—An explanation relative to the arbitration

"Year 1874.—Order of May 27.—Aullágas.—Instructions to the General Prosecuting Attorney concerning the mode in which he should demand possession of the estaca mines of the Treasury.

"Year 1874.—Resolution of June 12.—Various points of the questions propounded by the arbitrator judge, Sr. Santibanez, are decided.

"Year 1874.—Resolution of July 17.—Disapproval of the conduct observed by the Prosecuting Attorney of the District of Cochabamba as defender of the State before the tribunal of arbitrators.

"Year 1874.—Resolution of June 28.—Aullágas.—The measurement of the estaca mines of the State is made by the Engineers Harris and Minchin.

"Year 1874.—Order of July 31.—The initiative to propound questions with respect to the arbitral decision.

"Year 1876.—Decree of February 21.—The action relating to them is returned to the Ministry of Public Instruction.

"Year 1876.—Resolution of December 23.—Conditions under which their exploitation should be conducted, and, finally,

"Year 1876.—Resolution of December 24.—Alsop & Company.—Recognition of their debt and the conditions of its amortization."



affected were this theory of the Government of Chile well founded either in fact or in law (and the Government of the United States contends that even in that event the rights of the concessionaries under the contract would not have been in any way affected), it is perhaps well to look into this question, though it must be only cursorily, in order to determine whether or not the theory of *revindication* is well founded under all of the attending facts and circumstances.

This discussion may be properly prefaced by quotations showing the position of Chile (so far as that position may be gathered from published writings) upon this question of *revindication*, as it affects the position of the claimants in this case.

The first time that this doctrine seems to have been invoked in an effort to support the position assumed by the Government of Chile in this case was in 1882, when the court at Antofagasta in delivering its opinion regarding the case of the *Amonita*, hereafter discussed at some length, made the following statements:

"Considering; 1. That the territory comprised between the 23d and 24th parallels of south latitude, being occupied on the plea of revindication, by the Chilean arms, and the rupture of the treaty of the 6th August, 1874, being approved by the law of the country of the 3d April, 1879, Chili recovered the dominion over the National possessions which Bolivia had acquired in virtue of that treaty.

\* \* \* \* \*

"7. That Mr. John Wheelwright, not having a real right over the estacas of Instruction ceded by the said contract, nor that which the defendant possesses with the name of 'Amonita,' having ever been delivered to him, he cannot shelter himself, even under the doctrine of those authors of the Theoretical Right of Nations who, recognizing the positive principle of real right which authorizes the conqueror in a war to appropriate all the possessions which form part of the public dominion of the hostile State, nevertheless counsel the Nations who conquer a territory to respect the real rights constituted in fiscal possessions of the Nation whose the conquered territory is; nor less to make good his 'anticretic' and imperfect title against a private person, the possessor of a mine, which, with all the others of the Littoral of the North, came to be National possessions of the Republic of Chile, by the revindication and effective occupation of the said Littoral and to be governed by our Mining Code."<sup>a</sup>

Some two weeks later the court of second instance at Serena made the following statement regarding the same point, in passing upon the questions involved in the suit instituted by Wheelwright, for the possession of the mine *Justicia*:

"6. That the plaintiff has asked that effect may be given to that contract celebrated in Bolivia and with the Government of that Republic, and supporting his claim on the privileges which the laws

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<sup>a</sup> II Appendix, p. 124.

of that country conceded to the estacas mines called of Instruction when the territory in which the mine treated of it situated has returned to the dominion of the Republic of Chile.”<sup>a</sup>

More recently the matter has been mentioned in the diplomatic correspondence between the two Governments. The Minister of Foreign Relations of Chile, in his note of April 9, 1908, addressed to the American Minister at Santiago, used the following language:

“These guaranties were all the less worthy of consideration on the part of the Chilean Government for the reason that the greater part of them had been given in the form of security on *property situated in Chilean Territory which my country regained from Bolivia during the War of the Pacific* (Caracoles Mines), while the remaining security was on property three-fourths of the proceeds of which went to Bolivia by virtue of the Truce Agreement (right to certain revenues of the Arica Custom House in which Bolivia had an interest), the remainder being devoted to the maintenance of the Customs service itself.

“Therefore, one of these securities of the Alsop claim was given by Bolivia on *Territory which was really Chilean, while Bolivia has had almost the entire usufruct of the property on which the other security was given since 1884.*”<sup>b</sup>

Before passing to the next expression upon this point it may not be improper to suggest that these statements, certainly so far as they affect the disposition of the Arica customs receipts, do not wholly coincide with the facts, as the following brief analysis will show: From the middle of 1880 to the Pact of Truce in 1884, the Government of Chile appears to have received all of the proceeds of the Arica Customs House, amounting roughly to five and a half million pesos. It does not appear that one penny of this went to the Government of Bolivia. Under the Pact of Truce of 1884, *twenty-five per cent* of the total Bolivian customs receipts of the Port of Arica went to the Government of Chile to defray the expenses of collection. (It should be noted that the Government of Peru had, in 1879, undertaken to do what appears to be precisely the same service, first for *four per cent* and later for *five per cent* of the customs revenues.) Of the remaining seventy-five per cent of the customs receipts so collected at Arica the Government of Bolivia was required to set aside forty per cent (of the full amount) for the liquidation of claims of Chilean citizens against the Government of Bolivia, and the remaining thirty-five per cent was by the treaty turned over to Bolivia. This latter sum (thirty-five per cent) appears to represent the total amount of the Arica customs receipts that really went into

<sup>a</sup> II Appendix, p. 119.

<sup>b</sup> I Appendix, p. 139.

the Bolivian treasury. It would seem that under this arrangement the Government of Chile received directly and indirectly from 1884 up to the Treaty of Peace of 1904, \$4,272,037 upon the twenty-five per cent account; \$6,835,259 upon the forty per cent account—a total of \$11,107,296, or a grand total from 1880 to 1904 of \$16,596,387. The concessionaries had an absolute right to such part of this over and above 405,000 bolivianos annually as was necessary to liquidate their debt. Yet it must at this point be added that, notwithstanding this clear right of the concessionaries under their contract; and notwithstanding the Government of Chile had thus stipulated that forty per cent of the customs receipts should go to liquidate the claims of Chilean citizens, and notwithstanding the Government had at this time been repeatedly notified of the Alsop claim, and had been repeatedly importuned to make arrangements for its settlement, and, finally, notwithstanding the Government of Chile has since attempted to establish that Alsop & Co. was a Chilean citizen, not one cent of the customs collected by Chile prior to 1884 and not one cent of the funds thus specifically set aside by the Pact of Truce of 1884 for the liquidation of Chilean claims was ever offered to Alsop & Co. to liquidate their claim and not one cent of said proceeds ever reached their treasury.

More recently in a note from the Minister of Foreign Relations of Chile, dated October 15, 1909 (but not delivered to the Legation until November 27th), addressed to the American Minister at Santiago, the following language is used:

“The assurances constituted by the Government of Bolivia, in favor of the credit of Alsop & Co., are so much less worthy of the consideration of my country, since the greater part of them had been constituted on property situated in Chilean territory, that my country recovered from Bolivia in the Pacific War (Caracoles Mines) and the rest from property three fourths of the proceeds of which went to Bolivia in virtue of the Truce Covenant (the right to certain receipts of the Arica Custom House in which Bolivia had an interest), the other fourth part being destined to the maintenance of the service in the same custom house. So that of the guaranties of the credit of Alsop & Co., one was granted by Bolivia in territory that was really Chilean, and the usufruct of the other has been almost entirely enjoyed by Bolivia since the year 1884.

“With these antecedents given it is easy to prove that Chile does not affect any responsibility for the guaranties which the Government of Bolivia granted in favor of the credit of Alsop & Co.”<sup>a</sup>

It will be observed that this is but a repetition of the contention made by the Minister of Foreign Relations in his note of April 9,

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<sup>a</sup> I Appendix, p. 218.

1908,<sup>a</sup> and displays equally with that a lack of precise information concerning the real facts attending upon this phase of the controversy between the two Governments regarding this claim.

To return, however, to the question of *revindication*. In view of these repeated assertions, which are manifestly incomplete, it is desirable to note the position which the Government of Chile has assumed upon the question of *revindication* when it was seeking to justify in the eyes of the world the War of the Pacific, upon which it was but entering at the time the statements were made.

Under date of February 18, 1879 (within four days after the Chilean troops, without a previous declaration of war, occupied the Bolivian port of Antofagasta), in a note addressed to the various Foreign Ministers resident at Santiago, the Minister of Foreign Relations of Chile discussed this question in the following language:

“DEPARTMENT OF THE MINISTRY OF FOREIGN AFFAIRS,

“*Santiago, February 18th, 1879.*

“MR. MINISTER. On the 12th of the present month, His Excellency the President of the Republic, ordered that Chilean forces should be transported to the shores of the Desert of Atacama, in order to recover and occupy in the name of Chili, the territories she used to possess there before adjusting with Bolivia the boundary treaties of 1866 and 1874.

“The treaty of 1866 was annulled and disappeared on the celebration of that which bears the date of the sixth of August, 1874, and this latter has just been abrogated by deliberate and persistent acts of the Government of Bolivia, acts which import not only the complete disregard of the obligations imposed upon her by that solemn compact but likewise an insult to the good faith and conciliatory spirit of Chili to which her national honor could not submit.

“Having exhausted all the conciliatory expedients which her earnest desire for the tranquillity of South America caused Chili to constantly employ, all the appeals that were directed to her for the fulfilment of obligations legally stipulated in the treaty of 1874 being scorned and disdained by Bolivia, there remained no other resource for Chili but to again plant the flag in the territories of which, she had been owner and to return with it to numerous Chilean and foreign population and to their industrial establishments there established, that tranquillity, that confidence and that welfare, of which they had been deprived by the Bolivian administration.

“Chili, who loves the peace of South America almost as much as the tranquillity of her own soil, and whose history and conduct has ever been characterized by temperance and moderation, has been grieved to see, in her relations with Bolivia, her hopes of an amicable arrangement destroyed one by one, and herself placed, at last, in the painful necessity of seeking a solution by the aid of force.

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<sup>a</sup> P. 132, supra.

"She would not be, however, completely at ease, if, on taking this step, exacted at once by her conscience, her rights and her own dignity, she did not entertain the most intimate persuasion of finding in the calm and enlightened mind of Your Excellency, the most ample and complete justification of her conduct.

"Having received instructions to this effect from His Excellency, the President, I present Your Excellency's Government a brief and compendious review of the antecedents of the question and of the causes which have occasioned the latest events.

" I.

"The political emancipation of Spanish America having been established, the new republics did not delay in fixing their attention upon the territories embraced by their respective nationalities and over which the empire of their laws should rule. The same principle that the American Republics had for their limits the same which corresponded to the colonial divisions of which they were formed having been admitted by the various sections of America, it was easy for Chili to know how far toward the North the field extended upon which she should exercise her national activity.

"For this purpose it was sufficient to interrogate history, to consult the written thought of the Spanish sovereigns, and to examine the acts of jurisdiction which had been the consequences of this manifestation of the supreme will.

"This triple testimony does not permit doubt to be entertained that the southern boundary of Chili was, at least, the 23rd parallel of south latitude, or what is the same thing, that the coast and desert of Atacama to the bay of Mejillones inclusive, formed part of the territory of the Republic.

"In this conviction, the President of the Republic sent to the legislative body a message dated the 13th of June 1842, in which the following words occur.

"—The utility of the substance called *guano* which from time to time immemorial has been used as a fertilizer for working lands on the coast of Perú, being acknowledged in Europe, I have thought it necessary to send a commission of exploration to examine the *coast comprehended between the port of Coquimbo, and the hill of Mejillones*, for the purpose of discovering whether within the *territory of the Republic* guano beds exist, the working of which may produce a new branch of income to the public treasury; and although the result of the expedition did not fully meet the hopes that had been conceived, nevertheless from latitude 29° 35' to 23° 6', guano was found at sixteen points along the coast and on the neighboring islands, in more or less abundance, according to the localities in which those deposits exist."

"There accompanied this message a bill declaring the guano-beds national property, and proposing some regulations for their being worked.

"The bill having been approved and become a law of the Republic on the 31st of December in the same year, the Government of Chili learned afterwards with surprise that Bolivia exhibited, for the first time, pretensions to the desert of Atacama. Such pretensions had been disclaimed beforehand by the Chief Magistrate of that Republic, without any protest on the part of the other powers.

General Santa Cruz had, in effect, said in dictating the following decree, a few years previously, referring to Cobija; 'The necessity of encourgaing the *only port* in the Republic and bearing in mind that the want of funds to cover the expenses demanded by the projected works, renders useless all the means which the Government has adopted for the prompt realization of so interesting an object, I decree: Colonel Manuel Amaya is authorized to raise a loan of one hundred thousand dollars. \* \* \*

"Later on, in a message dated August 6th 1833 General Santa Cruz, the President, said to the representative of Bolivia, as follows.

"After your recess during the anterior legislature I have complied with the promise which I then made you of visiting in person the coast province, wishing to duly fulfil your wishes and the law of the 12th of October of the last year passed in favor of our only port Cobija. \* \* \* '

"With antecedents such as these, it could not be regarded without a certain amount of wonder, that Bolivia should on its part manifest pretensions, and exactions in direct opposition to the clear rights of Chili to the domain of the desert of Atacama, and which were, at the same time, incompatible with the convictions of the Supreme Magistrate of that Republic unequivocally expressed in the documents I have just cited.

"The Government of Chili, however, being desirous of forming, in respect to this important question, an opinion that should be completely exempt from the disturbing influences ordinarily created by national interest, undertook a careful examination of the archives, submitted to a lengthy examination the documents produced on both sides, and made a calm comparison of the titles with which each nation sustained its respective rights.

"This agreeable task served to strengthen and confirm the conviction which it had, that the coast and desert of Atacama up to the 23 parallel were evidently an integral part of the national territory.

"Deploring the error into which the Government of Bolivia had fallen, when it claimed to fix the dividing limit between both countries at the mouth of a river called the Salado, the course of which, the geographers that it called to its support, mark out with a curious variety, sometimes at latitude 25° 30', sometimes in the 26° and even in the 27°, the Government of Chili, produced in answer to this vague, indecisive and, not infrequently, contradictory evidence, titles of unanswerable value, from the probatory force of which it is believed it difficult for any dispassionate mind to withdraw itself.

"It was, in truth, easy to show that since the middle of the fifteenth century, the most respectable writers and those who inspire the greatest amount of credit, such as Pedro Cieza de Leon in his work entitled '*A First part of the Chronicle of Peru* (Primera parte de la crónica del Perú) published in 1553, the Inca Garcilasso de la Vega, a celebrated compiler of the traditions of that country, in his Commentaries, which appeared in 1609 and 1616; the jesuit Anello Oliva, who published a history of Peru, and others of equal fame—are of one accord in affirming that the desert of Atacama formed part of Chili.

"But, and apart from evidence of this nature, there are official documents which prove that the territory of the Republic extended

to the 23rd parallel, and that in the territory extending towards the south, jurisdiction has been exercised by the authorities of Chili since the colonial times. It appears, therefore, from these documents, that some portions of territory in the desert of Atacama having been found fit for cultivation, towards the latitude of  $24^{\circ} 30'$ , they were solicited 1879, by way of grant, from the Governor and Captain General of Chili, and by him granted to the discoverers. It also appears that Nuestra Señora bay, known under the name of Paposo, situated in  $24^{\circ} 30'$ , that is to say, in the middle of the desert, was towards the end of last century, the centre of the commerce of the coast of Atacama, and the place of residence for nearly all the inhabitants of that region. Paposo, therefore, was the capital of a district which embraced all the region in which there were inhabitants and was governed by a judge appointed by the authorities of Chili. The royal orders of June 3rd 1801 and June 26th 1803, which are even more explicit, declare that Paposo was considered as the capital of all the coast and desert of Atacama and that all that territory was subjected to the authorities of Santiago. The royal cedula of the 10th of October 1803, afterwards ordained that the desert of Atacama should be segregated from Chili and incorporated in Peru, but these letters-patent never took effect, and only served to leave the fact established in a yet more unequivocal manner that that region had pertained to the Captaincy General of Chili in the colonial times, and that it continued afterwards forming part of the Republic.

"It is well known that in 1789 there sailed from Cadiz a scientific expedition composed of the corvettes *Descubridora* [*Descubierta*] and *Atrevida* commanded by Captains Malaspina and Bustamante. This commission, which the sovereign of Spain had entrusted to competent persons of well known ability, had for its principal object, the exploration of the coast of South America. To assure the greatest fidelity and exactness in the labors entrusted to their charge, there were placed at the disposition of the chiefs of the expedition all the documents of the Department of the Indies which existed in the Spanish archives and at the same time a circular was despatched, dated, Madrid, February 5th, 1789, giving orders to the Viceroy and Captains General of the New World, to aid and assist with all the elements at their disposal the mission of Captains Malaspina and Bustamante, and to give them free access to the valuable archives of the then suppressed Society of Jesus.

"The expedition touched at Montevideo, doubled Cape Horn, and off Chiloe, commenced its survey of the coast of South America, northwards. The result of this expedition, prepared and provided with the most scrupulous care with all the elements necessary to assure the accomplishment of its important object, was the spherical chart,—still preserved,—presented to the King of Spain by Don Juan de Lángara, Secretary of State and of Unisal Marine Affairs. In this valuable chart, whose importance is beyond discussion, the northern limit of Chili was designated at the 22nd parallel, and naturally assigns her, or recognized her dominion over, an extent of territory greater than that she had peaceably possessed since the colonial epoch.

"As one of the manifold proofs that I could adduce in support of the jurisdiction that Chili has always exercised in that region, I

do not consider it too much to observe that the Custom-House at Valparaiso alone, granted in fulfilment of the law of October 31st, 1842, during the period elapsing from that date until the year 1857, one hundred and thirteen permits to different vessels of different nations to load guano in Mejillones, Angamos, Santa Maria and the other ports of the coast of the Desert.

"The manifestations of the sovereign will and the acts of jurisdiction exercised by Chili, during the two epochs of its political existence, over the desert of Atacama up to the 23rd parallel, could not find space, were they to be all set forth, within the narrow limits of this communication. While limiting myself to indicate but a few, I have carefully borne in mind the consideration of not overtaxing the kind attention of Your Excellency."

"I am flattered, however, by the belief that they will suffice for your Excellency to be persuaded that it was not the part of Chili to abandon to Bolivia, territories of which she considered herself owner and lawful possessor.

"While Chili firmly sustained her rights of dominion and peaceable possession in the Desert up to the 23d parallel, she did not cease to seek with careful anxiety all the means that appeared becoming for the purpose of approaching a solution of the existing misunderstanding. The different steps taken for that purpose, did not conduce, however, to the desired result which was to have been expected and both Republics saw years pass by and the cordiality of their relations more and more estranged." <sup>a</sup>

In view of the fact that this statement of the case was given at a time when it must be assumed that the Government of Chile was largely occupied in conducting an aggressive warfare, and that therefore it may be assumed that little leisure might be found at the disposal of its Minister of Foreign Relations for the preparation of a paper of this nature, there is presented an additional discussion of this question prepared, it would seem from the title page, in the year 1900, long after the close of the war, and when there had been abundant time and opportunity to collect all possible data bearing upon this question from the standpoint of the contention of Chile. The author of this pamphlet, Rafael Egana, discusses this question as follows:

"The Republics of South America, from the time that they declared themselves emancipated from the yoke of Spain, and constituted in free Republics, proclaimed that their limits were those that had formerly bounded the colony from which they arose. This principle of international law of the continent is known by the phrase '*uti possidetis* of 1810.'

"The historical authorities, the written orders of the Spanish monarchs and the jurisdictional acts of former governors, the natural and obligatory sources of the *uti possidetis*, uniformly coincided in establishing that the northern limit of Chile was, at the very least, the twenty-third parallel of South latitude (Lat. 23° S.) so

<sup>a</sup> I Appendix, p. 263.



that the desert and coast of Atacama, to the Bay of Mejillones, inclusive, formed part of Chilean territory.

"The most trust-worthy and respectable ancient historians, as Pedro Cieza de Leon, in his *Chronicles of Peru*, published in 1553; the Inca Garcilazo de la Vega in his *Royal Commentaries* published in 1609; the jesuit Anello Oliva in his *History of Peru*, and other persons equally authorized, agreed in affirming that the Desert of Atacama was Chilean territory.

"The jurisdictional acts of the Governors of Chile also prove this fact. Thus in the year 1679 some tracts of land suitable for cultivation having been discovered, in latitude  $24^{\circ} 30'$  S. they were asked as a grant from the Governor and Captain General of Chile and granted by him to the parties who discovered them, no other governor protesting although these were as jealous as they are at present of their rights and privileges of domain.

"The Port of Paposo, situated in latitude  $24^{\circ} 30'$ , the commercial centre of the Desert of Atacama was under the jurisdiction of a judge appointed by the Chilean Authorities. This Chilean jurisdiction was confirmed by Royal Orders of June 3rd, 1801 and of June 26th 1803. These orders explicitly declared that Paposo was the capital of the coast and desert of Atacama and was submitted to the authority of Santiago of Chile.

"The testimony of the historians and the dominion exercised by the Chilean governors is corroborated by the written resolutions of the Spanish kings. To the royal orders of 1801 and 1803, which we have just cited, we may add the Royal letters patent of Oct. 10th 1803 which order that the desert of Atacama be separated from Chile and thereafter incorporated with Peru. . This order that was never carried into effect leaves most clearly established that up to the date at which it was issued, that district formed part of Chile, and by the fact of not having come into force, it left in *statu quo* the state of things that it was intended to modify.

"The interesting and valuable map drawn by the naval captains Alejandro Malaspina and Jose Bustamante, during the scientific expedition of 1789 by order of the king of Spain and with the assistance of the viceroys and captain generals of America, shows as the northern limit of Chile the 22nd degree of south latitude, thus assigning her a more extensive territory than she had always enjoyed without dispute. We should add, that by a royal decree, for the greater exactitude of this map, all documents related with the matter in the archives of Spain as well as those existing in the colonies, were placed at the disposition of the commissioners.

"It would be an endless and laborious task to enumerate all the proofs that confirm the fact, while for our purposes it is sufficient to leave it on the solid basis that we have demonstrated.

"These historical, scientific and political antecedents were admitted and recognized, in official documents by the Government of Bolivia. In 1832 General Santa Cruz dictated a decree in which, authorizing Colonel Manuel Amaya to raise a loan, he said in reference to Cobija:

"'This being necessary to protect *the only seaport* of the Republic, and seeing that the want of money to pay the expenses which must be incurred for the works proposed renders fruitless all measures that Government has adopted for the early realization of this important object, I decree \* \* \*

"Shortly afterwards, on the 6th of August, 1833, the same President of Bolivia, General Santa Cruz, delivered to the Congress of the nation a Message in which we read:—'After your recess in the anterior legislative period, I have fulfilled the promise I then made, to visit the coast province, desiring to duly carry out your wishes and comply with the law of Oct. 12th of last year, in favour of *our only seaport*.'

"Analogous acts of the Chilean Government confirm the rights, never discussed, of this nation. Thus on the 13th of July, 1842, the President of the Republic addressed a Message to the Congress in which he said.—'The utility of the substance called guano being recognized in Europe, while from time immemorable it has been in use as a manure for fertilizing the land on the coast of Peru, I have judged it necessary to appoint an exploring commission to examine *the coast lying between the Port of Coquimbo and the Morro de Mejillones*, in order to discover if *in the territory of the Republic* any deposits of guano exist, the export of which might form a new branch of income for the national exchequer; and though the results of the expedition have not freely corresponded with the hopes we have formed, nevertheless from 29° 35', to 23° 6' of north latitude, guano has been found at sixteen places on the coast and on islands near it, in greater or lesser abundance, according to the localities where these deposits exist.'

"This Message formed the preamble of a project of law in which the discovered guano deposits, were declared national property, as well as any that might afterwards be discovered, and rules were established for their working. This project was approved by Congress and was promulgated, Dec. 31st, 1842."

So far as the Government of the United States is aware, this fairly represents the position of the Government of Chile upon the question of its *revindication* of the Bolivian Littoral.

(2) *The question as discussed by historians*.—While it is not contemplated, as a matter of original investigation or discussion, directly to enter into any extended consideration regarding this question (since in the opinion of the Government of the United States it is wholly immaterial so far as the rights of the concessionaries in this case are concerned whether the Government of Bolivia exercised the full and complete sovereignty obtaining over the Bolivian Littoral by virtue of a concession from Chile, as that Government appears to contend, or because the Government and sovereignty of Bolivia had always extended over that territory)—still the Government of the United States desires to call attention to the following facts and circumstances concerning this question.

The origin of the territory of Bolivia and the extent of its territories have been discussed by historians as follows:

In an article upon the "Colonial History of South America, and the Wars of Independence," by Clements R. Markham, C. B., F. R. S., (Winsor's Narrative and Critical History of America,

Vol. VIII), the following statements are made regarding the territories comprised later within the boundaries of Bolivia:

"For more than two centuries and a half the whole of South America, except Brazil, settled down under the colonial government of Spain, and during the greater part of that time this vast territory was under the rule of the viceroys of Peru residing at Lima. The impossibility of conducting an efficient administration from such a centre, which was separated from its dependent parts by many hundreds of miles of mountains, deserts, and forests, at once became apparent. Courts of justice called *Audiencias* were, therefore, established in the distant provinces, and their presidents, sometimes with the title of captains-general, had charge of the executive under the orders of the viceroys. The *Audiencia* of Charcas (the modern Bolivia) was established in 1559. Chile was ruled by captains-general, and an *audiencia* was established at Santiago in 1568. \* \* \* (p. 295.)

"In 1629 a single viceroyalty included Buenos Ayres, Assuncion, Charcas Potosi, and Cochabamba \* \* \* (p. 360).

"In 1776 Buenos Ayres was also elevated to the rank of a viceroyalty, the territory of which included the presidency of Charcas (the modern Bolivia) up to the Lake of Titicaca, and the province of Cuyo, which had hitherto been a part of Chile \* \* \* (p. 315).

"In April, 1825, the Dictator Bolivar made a triumphal progress through the principal cities of Peru, as far as Potosi and Chuquisaca. In August a general assembly met, and decreed that Upper Peru, which had been a part of the viceroyalty of Buenos Ayres since 1777, should be a separate republic, with the name of Bolivia. General Sucre was elected the first president, from 1826 to 1828 \* \* \* (p. 338).

"The republic of Bolivia received an independent existence from Bolivar owing to the unanimous wish of the people. In Spanish times, as Upper Peru, or Charcas, it had always been ruled by its own *Audiencia*, but without a separate captain-general. Very jealous of foreigners, the people expelled General Sucre after two years and were afterwards ruled for a long time by General Andres Santa Cruz, descendant of a long line of native chiefs. \* \* \* (p. 340).

In further discussing this question of the limits of Bolivia, the same author, in a work entitled "The War Between Peru and Chile," makes the following comments, with the citations therein incorporated:

"The rights of the case are as follows. When the South American republics became independent their limits were, by general agreement, fixed according to the *uti possidetis* of the year 1810, that is to say that the boundaries of Spanish provinces, as recognized at that time, were adopted as the boundaries of the republics. On this principle the boundaries of the Bolivian province of Atacama, on the Pacific coast, extend to the southern limit of Peru on one side and to the northern limit of Chile on the other. Both had been clearly defined before the year 1810. The Peruvian limit, which is that of the province of Tarapaca, commences on the coast near Tocopilla in 22° 33' S., and passes up the ravine of Duende to the

river Loa. It was carefully delineated in 1628, and the boundary-marks are recorded in a document which is still extant. The northern limit of Chile was fixed at a place called El Paposo, in  $25^{\circ} 2' S.$ <sup>a</sup>

"In 1776, when the viceroyalty of Buenos Ayres was created, orders were given that the province of Charcas should be included in it. The limits of Charcas (modern Bolivia) were then said to be well known, and to have been defined in the ninth law for the Indies (Titulo 15, Book ii.). The coast province of Atacama was there declared to extend to the first Chilean inhabited place at Paposo. The same boundary is given in the official descriptions by Dr. Cosme Bueno.<sup>b</sup> It is shown on De la Rochette's valuable map of South America, published in 1807, which was based on original Spanish authorities, including Malespina and the 'Mapa de las fronteras del Reyno del Peru, 1787.' Moreover this boundary was tacitly accepted by the Chileans. In their official map, accompanying the work of Claudio Gaye, Chile ends at Paposo. After Fitz Roy's survey, when the sailing directions were being prepared, inquiries were made of the Chilean authorities as to the position of the boundary, and it was placed to the south of  $25^{\circ} S.$ <sup>c</sup> On Colonel Ondaza's official map of Bolivia (1859) the boundary is placed correctly at Paposo. The topographical map of Chile by Pissis only extends to Copiapo,  $27^{\circ} 20' S.$  It will thus be seen that the boundary between Chile and Bolivia, according to the *uti possidetis* of 1810, was south of  $25^{\circ} S.$ ; and that this was acknowledged by implication, even on the part of the Chileans themselves.

"It was only when the great value of Atacama was discovered that any question was raised. Then Chile laid claim to the 23rd parallel. It has been shown that her boundary was south of  $25^{\circ} S.$  This was, therefore, an unjustifiable claim, and as such all subsequent arrangements that were based upon it, were vitiated. The Bolivian Government must have been ignorant of the rights of the case, for they appear to have looked upon the consent of Chile to accept the 24th parallel as a concession. Chile had no more right to  $24^{\circ} S.$  as a boundary than she had to  $23^{\circ} S.$  But General Melgarejo, the President of Bolivia, agreed to a treaty with Chile, in that sense, bearing date the 10th of August, 1866. It, however, was never ratified by the Bolivian Congress. Chile consented to withdraw her more exaggerated claim, and to adopt  $24^{\circ} S.$  as her boundary.<sup>d</sup> In return for this pretended concession it was further

<sup>a</sup> The map of La Rochette (1807) places Paposo in  $25^{\circ} 46' S.$  Colonel Ondaza's map (1859) in  $25^{\circ} 33' S.$  The Admiralty chart in  $25^{\circ} 2' S.$ ; with which the "*Geografía Nautica de la Republica de Chile*," by Vidal Gormaz (p. 108) agrees. Vidal Gormaz notices that in the old maps Paposo is placed forty miles too far south. (Markham's Note.)

<sup>b</sup> See *Diccionario Historico-Biografico del Peru*, por Manuel de Mendiburu, iv. p. 198. (Markham's Note.)

<sup>c</sup> "South American Pilot." Part II. Sixth edition, 1865, p. 327. "Between the bight of Hueso Parado and Punta San Pedro:" that is in  $25^{\circ} 30' S.$  (Markham's Note.)

<sup>d</sup> The Chileans then erected a boundary pyramid on the coast, fifty feet above the level of the sea, in  $23^{\circ} 58' 11'' S.$  (intended as  $24^{\circ} S.$ ) to mark their new temporary boundary. Vidal Gormaz (*ubi sup.*), p. 115. (Markham's Note.)

stipulated that Chile should receive half the value of customs dues from mineral exported between the 23rd and 24th parallels, while Bolivia was to have the same privilege as regards the coast-line between the 25th and 24th parallels. As the whole territory in question belonged by right to Bolivia this was a tolerably cool arrangement on the part of Chile, especially as the rich deposits are situated to the north of 24° S.

Other literature upon this question (which is somewhat extensive) seems to leave little room for a legitimate doubt that the Government of Bolivia always possessed the legal title to the district known as the desert of Atacama as far south as Paposo. It is unnecessary even to list various critical essays which have been written on this subject, though in order that the discussion may be complete there is included below excerpts from one of the most careful discussions upon this subject.

In Dr. Victor M. Maurtua's work "The Question of the Pacific" as "enlarged and brought up to date" by F. A. Pezet, F. R. G. S., the question is discussed in the following manner:

"THE ANCIENT GEOGRAPHY.

"The vast desert of Atacama, situated between 23° and 27° of south latitude, was from time immemorial practically a no-man's-land, but a century before the Spanish invader discovered and conquered the great Inca Empire, Tupac Yupanqui, the warrior Inca, sent an expedition to the south of his domain and extended his empire to the Maule river, thereby incorporating the desert of Atacama with his vast possessions of South America.

"The Spanish adventurers who overran this empire were the first to divide up its territory and form the first demarcations of the future independent republics.

"Francisco Pizarro, the conqueror of Peru, as early as 1529 obtained a concession of territories comprising a length of 470 leagues, and the American historian, Prescott, takes this concession to extend from 1° 20' to 25° 31' 24" south latitude.

"Diego de Almagro, Pizarro's lieutenant, likewise obtained a concession of 200 leagues to the south of his chief's concession. The Royal Charter of the Crown of Spain, whereby this concession is granted, reads thus:

"He will discover, conquer and people the lands and provinces extending along the seaboard to the south and towards the east within 200 leagues in the direction of the Straits of Magellan, taking these 200 leagues from the point where end the limits of the government, which by the concession and our provisions we have entrusted to Captain Francisco Pizarro.' \* \* \*

"To the south of Almagro's concession, a third concession was granted to Pedro de Mendoza, the governor of the River Plate. This concession was likewise of 200 leagues, and extended from the

southern limit of Almagro's possessions in the direction of the Straits of Magellan.

"Almagro was succeeded by Pedro de Valdivia, the founder of the city of Santiago, the present capital of Chile; he was appointed Governor of Chile by President La Gasca, who was then governing Peru in the name of the Spanish Crown. La Gasca wrote on May 7th, 1548, to the Council of Indies, as follows: 'On the 23d of April, 1548, Pedro de Valdivia was sent as Governor and Captain-General of the Province of Chile known as 'Nuevo Estremo,' and which limits from Copiapo, which is at 27° from the equinoxial line toward the south until 41° to the north, to south straight meridian, and wide from the sea inland 100 leagues west to east.'

"The Spanish monarch, Emperor Charles V., confirmed this concession in the following terms:

"'Whereas, Licentiate Pedro La Gasca, our President, who was of the Royal Audiencia of the Provinces of Peru, and who at present is Bishop of Placencia, while being in the said Provinces of Peru, by virtue of the special powers which he held from us to appoint new Governors and make new conquests \* \* \* we declare to be valid for the time which our grace and wish may last, or until we shall decide otherwise, that you shall have the Government of the said Province of Chile, within the limits which the said Bishop of Placencia indicated to you.'

"This primitive divisory line, which shows the territorial rights of Chile and Peru, was never altered, and it was sanctioned by the principle of American public law, known by the incorrect name of *Uti possidetis* of 1810.

"The Viceroyalty of Peru, which was constituted on the basis of the ancient government (gubernaciones), comprised all the vast dominions of the Spanish Crown in South America. In later years it was broken up in order to organize the Viceroyalties of Santa Fe and of Buenos Aires. But neither of these partitions affected the northern boundary of Chile.

"During the several centuries of the Spanish domination, that boundary line was invariably respected. None of the concessions which were made in favor of the Audiencias of Lima, Charcas and Santiago of Chile, altered this northern boundary, and it remained as it had been drawn up by La Gasca. During all this time 27° south latitude was the acknowledged northern limit of the government of Chile.

"In 1646, Reverend Father Ovalle published at Rome his celebrated work, 'Historic Relation of the Kingdom of Chile,' on the frontispiece of which appeared a map on which at the point designated as Copayapu, which he names Port of Copiapó, was inscribed the following sentence: *Peruani et Chilenensis regni confina*.

"And it is worth recalling that this boundary was not drawn by an imaginary line; it was marked out by means of regular landmarks. These landmarks occupy nearly exactly the position of the parallel which the concessions of Almagro reached.

"Viceroy Abascal, in his report for the year 1806, says:

"'The Viceroyalty of Peru, after the last dismemberments and annexations, has the following limits: On the north, the Province of Guayaquil; on the south, the desert of Atacama \* \* \* com-

prising in all its territory from 32' to the north of the equinoxial line to 25° 10' of south latitude.'

"The several constitutions which have been promulgated by Chile have always acknowledged as the northern boundary of the Republic the line which divided it from the Peruvian Viceroyalty at Copiapó.

"The following are extracts from such constitutions:

"1822. The territory of Chile recognizes as its natural boundaries, on the south, Cape Horn; on the north, the desert of Atacama.

"1823. The territory comprises from Cape Horn to the desert of Atacama.

"1828. The Chilean nation extends in a vast territory, limited on the north by the desert of Atacama.

"1832. Its territory comprises from north to south, from the desert of Atacama to Cape Horn.

"1833. The territory of Chile stretches from the desert of Atacama to Cape Horn.

"On March 31st, 1823, the Chilean Government established its most northern department, according to the following text:

"First Department: From the desert of Atacama to River Choapa.

"In 1826, this division was declared a province, as follows:

"First Province: From the desert of Atacama to the River Choapa.

"This province shall be known as Province of Coquimbo; its capital city will be La Serena.

"When Spain finally acknowledged the independence of Chile by the treaty of 1844, its boundaries were thus described: 'All the territory which extends from the desert of Atacama to Cape Horn.'

"And finally, President Bulnez, of Chile, and Minister Montt, in 1842, acknowledged the Papal Bull by which the Bishopric of La Serena was created, wherein the territory of this diocese is described as extending from the River Choapa to the desert of Atacama.

#### "THE POSSESSION OF ATACAMA BY BOLIVIA.

"Bolivia, before the War of Peruvian Independence, was known by the name of 'Upper Peru.' When General Simon Bolivar finally emancipated South America from the Spanish yoke, and definitely set up Peru as a free and independent republic, he constituted Upper Peru into an independent State under the name of Republic of Bolivia.

"General Sucre, the first President of the new Republic, commissioned Colonel Francisco B. O'Connor, in 1825, to proceed to the *Province of Atacama* to make a thorough survey of its coast and to establish a seaport. In his instructions the following appears: '*There are three ports*, and of these you may select the best. The said ports are: *Atacama*, *Mejillones* and *Loa*; the two first have no water, and the third is the one which the Liberator prefers, although it does not afford good anchorage, but solely on account of its close proximity to Potosi and of its river. Should it not be desirable, you will survey the other two, *or any other*, with a view of establishing thereat a large city. \* \* \*

"General Bolivar, the Liberator, issued on the 28th of December, 1825, the following decree:

“ ‘Simon Bolivar, Liberator, etc., etc., whereas:

“ ‘*First*. These provinces have no *established port*, and, as in the *partido de Atacama*, there exists a port known by the name of ‘Cobija,’ which offers many advantages;

“ ‘And considering that it is a just reward to the merits of Grand Marshal Don Jose de La Mar, victor at Ayacucho, that his name be given to the above-mentioned port: After hearing the permanent deputation;

“ ‘Hereby decrees:

“ ‘*First*. That from the first of January next, the port of these provinces be established at Cobija, under the name of Mar.

“ ‘*Second*. That the necessary offices be established there, etc.’

#### “ ENCROACHMENT AND INVASION.

“The beginning of Chilean encroachment on Bolivian territory was concurrent with the discovery of guano in the desert of Atacama.

“Until 1842 Bolivia had been in unmolested possession of the littoral which she had acquired at the time of her erection as an independent republic.

“In that year the Minister of Finance of Bolivia wrote to the Prefect of Cobija as follows: ‘I have resolved to inform that prefecture that the most stringent measure be adopted, so as to prevent any incursions by the parties holding guano concessions outside of the limits of the Rivers Loa and Paposo, which comprise the littoral of this Republic.’

“Bolivia at the time had a custom house at the mouth of the Paposo river. Between the years 1842 and 1845 the Consul of Bolivia, at London, brought a suit against the Chilean frigate ‘*Lacaw*’ for having taken clandestinely a cargo of guano from the littoral. The British law courts sentenced the said ship, and the Chilean Minister at London raised no objection either to the suit or to the sentence.

“The Government of Bolivia, in order to protect its guano deposits from any possible raids, commissioned the brig ‘*General Sucre*’ as a war vessel, and some time later this vessel captured the ‘*Rumera*,’ a Chilean ship, which was loading guano in Bolivian territory.

“From the time of the guano discoveries, the incursions and raids on the Bolivian deposits by Chileans was continuous, so much so that finally the authorities at Cobija decided to put a stop thereto, and to this effect they captured and carried away a party of Chileans who were clandestinely extracting guano near Mejillones. The Chilean war ship ‘*Chile*’ came to their rescue, freed them, and landing a force at Mejillones, constructed a sort of small fort, over which they hoisted the Chilean flag.

“When the Bolivian Minister in Chile presented his Government’s claims against Chile for this and other aggressions, he stated that ‘the present policy was in contrast with the course which had been followed only a short time before, when in the case of the schooner ‘*Janequeo*,’ accused of a similar offense, ample satisfaction had been given to the Bolivian Government, and that the aggressive act perpetrated by the man-of-war ‘*Chile*’ did not prove a pacific act of possession, but that it implied an outrage.’



"Doctor E. S. Zeballos, who was at one time Minister of Foreign Affairs of the Argentine Republic, and Plenipotentiary of that Republic at Washington, in his treatise on Spanish-American Public Law, referring to the action of Chile, says: 'This is how Chile first appeared in Atacama, to the north of the Paposo river.'

"Senor Montt, the President of Chile, in his Message to Congress on July 31st, 1842, said:

" 'Inasmuch as the usefulness of the substance known as 'guano' has been recognized in Europe, although from time immemorial it has been used as a manure for fertilizing the land on the coast of Peru, I deemed it advisable to send a commission to explore and examine the seaboard from the port of Coquimbo to the head of Mejillones, for the purpose of discovering if any guano deposits existed in the territory of the Republic, which, properly worked, might furnish a new source of revenue to the treasury; and notwithstanding that the result of the expedition has not come up to our expectations, guano has been discovered from 29° 35' to 23° 6' of south latitude.'

"This Presidential Message served as the introduction to the bill that was discussed and passed by Congress on October 31st, 1842, to the effect that: 'All the guano deposits which exist in the Province of Coquimbo, in the littoral of Atacama, and in the adjacent islands, are hereby declared as national property.'

"From the passing of this law dates the first official step of Chilean expansion to the north of her original frontiers.

"But no sooner had this bill become law than Señor Olañeta, Bolivian Plenipotentiary in Chile, acting on instructions from his Government, demanded that the Chilean Executive 'should request Congress to formally revoke this law which extended the frontiers of the Republic to the prejudice of Bolivia' (January 30th, 1843).

"The Chilean Foreign Office, in its reply, feigned surprise, stating that 'whatever opinion the Government might form, in view of the reasons and grounds that might be adduced, it could never enter its province to alter the existing laws, by making the declaration which it had been called upon to make.'

"And thus was started the diplomatic controversy which had extended over a period of sixty years, and caused already one bloody war and created so much ill feeling in the southern continent."

It would seem, from these statements made by historians of repute, that perhaps the Government of Chile has failed in its study of the case to give due weight to the consideration which may be urged against the position which it has assumed.

(3) *The question considered from the standpoint of the governmental acts of Chile:* (a) *Constitutional provisions.*—That this is also a reasonable deduction from the facts of the case, seems to be made entirely clear upon taking into consideration the various early acts and expressions of the Government of Chile itself regarding this matter. For example, Article III of Chapter 1 of Title 1 of the Political Constitution of the State of Chile, signed

by order of the Constitutional Convention October 23, 1822, lays down the boundaries of the State of Chile as follows:

“POLITICAL CONSTITUTION OF THE STATE OF CHILE.

“TITLE I.—*Relating to Chile and the Chileans.*

“CHAPTER I.—CONCERNING CHILE.

*“The territory of Chile has for natural boundaries: On the south, Cape Horn; on the north, the uninhabited Atacama; on the east, the Andes; on the West, the Pacific Ocean. The Islands of the Chiloé Archipelago, the Island of Mocha, the Islands of Fernandez, the Island of Santa Maria and other adjacent islands belong to Chile.”<sup>a</sup>*

The provisions of Article IV of Title 1 of the Political Constitution of the State of Chile, promulgated December 29, 1823, makes the same provisions:

*“The territory of Chile extends from North to South, from Cape Horn to the uninhabited Atacama; and from east to west, from the chain of the Andes to the Pacific Ocean, with all the adjacent islands including the archipelago of Chiloé, the islands of Juan Fernández, Mocha and Santa Maria.”<sup>a</sup>*

The provisions of Article II of the Political Constitution of the Republic of Chile, promulgated on the 8th of August, 1828, are likewise to the same effect. This article reads:

*“Its territory extends, from north to south—from the Atacama Desert to Cape Horn; and from east to West from the chain of the Andes to the Pacific Ocean together with the islands Juan Fernández and others adjacent. It is divided into eight provinces which are: Coquimbo, Aconcagua, Santiago, Colchagua, Maule, Concepcion, Valdivia and Chiloé.”<sup>b</sup>*

Finally, it was provided in the Political Constitution of the Republic of Chile, attested and promulgated the 25th of May, 1833, Chapter 1, Article I, that:

*“The territory of Chile extends from the desert of Atacama to Cape Horn, and from the Chain of the Andes to the Pacific Ocean, taking in the Archipelago of Chiloe, all the adjacent islands and the Islands of Fernandez.”<sup>c</sup>*

The following comments upon the language of these various constitutional provisions made by M. Gonzalez de la Rosa, in 1879, seem to embody a not improper interpretation of the words above used:

“If the Constitution meant to imply that by the term ‘from Atacama’ the whole desert was included, it is evident that Chili ought

<sup>a</sup> I Appendix, p. 353.

<sup>b</sup> I Appendix, p. 354.

<sup>c</sup> I Appendix, p. 355.

to have wholly occupied said desert, that is to say, from the Loa or at least from Cobija, Calama &c. But Chili had never even dreamt of such a proceeding, until lately, the discovery of the saltpetre caused her forgotten or at least neglected rights to bud forth. Moreover it is impossible to recognize the mere utility of an object as the origin of the divine right of possession since in that case all our light fingered friends would obtain an undeniable right and excuse to the total suppression of the seventh commandment. On the other hand, the above mentioned article, which every Chilean is bound to obey and respect, on explaining or setting forth, the following are the natural limits of Chili, the Desert, the Andes, Cape Horn and the Pacific ocean, gives us to understand thoroughly that the Chilean territory is limited by, bounded by or has its termination in that spot where the sea, the Andes, the desert or Cape Horn commences. For if it were not so, if the Chileans believe they are correct in asserting that the northern limit does not exclude but includes the desert of Atacama, with equal justice they could maintain that to them appertain the Pacific, the Andes and all the sea and lands that extend from the cape to the pole. This is all the more absurd since when one speaks of boundary lines, one naturally implies *lines which separate, and not territories that extend over a 100 leagues like the desert of Atacama*. It is therefore most fully demonstrated, that the meaning of the Chilean statute which every Chilean is bound to obey, is that the limit or *boundary line* of the Republic of Chili to the north ought to be drawn at the point where the Atacama desert begins, not where it concludes, or in other words, that the Chilean jurisdiction terminates at the Salt River or the Paposo."

The provisions of the Chilean Constitution of 1833 appear to have remained in full force and effect until 1888, when, on August 9, the National Congress, ratified the following:

"Project for Constitutional Amendment.

"The National Congress, exercising the power conferred upon it, by Article 167 of the Political Constitution, ratifies the proposition for amendment contained in the following project, published in *El DIARIO OFICIAL*, December, 1887:

"Article 1. *Articles I and IX of the Constitution are suppressed; the word 'distinciones' of the 4th paragraph of Art. XI; the second paragraph of Art. XXIV; and the clause 'aplicandose esta misma regla a los senadores suplentes' of the last paragraph of the same article.*

\* \* \* \* \*

"Therefore, with the knowledge of the Council of State, the preceding provisions are promulgated and are held to be an integral part of the Political Constitution of the State."

(See *Derecho Constitucional*, published 1889, by Julio Bafiados Espinosa, p. 625.)

The record of the proceedings of the Congress, at which it was decided to amend the Constitution containing the article giving

the boundaries of the State of Chile, are recorded in the DIARIO OFFICIAL of 1887, p. 2719, as follows:

"A quorum being present, the amendments to the Constitution were considered.

"A project submitted by the Legislative and Judicial Committee was read. The first article read:

"Arts. 1 and 9 of the Constitution shall be suppressed.

"A member then asked that the suppressed articles of the Constitution be read to the Chamber. This was done. The project for the suppression of Articles 1 and 9 of the old Constitution was then adopted unanimously."<sup>a</sup>

The writer of the same work from which the various constitutional provisions above quoted are taken, Julio Bañanos Espinosa also gives, on page 41 of his work, the Political Constitution of the Republic of Chile as it was in force in 1889 (the date on which his book was published). In this Constitution there is no mention of the boundaries of the Republic of Chile. A foot-note explains that the articles have been re-numbered and that the numbers in parentheses show the numbering in the original Constitution of 1833. From this numbering it appears that the original Article I of the Constitution of 1833 (relating to territorial limits) has been suppressed and the suppression has continued in the Constitution in force in 1905, as the latter constitution is printed in the work, "American Constitutions," by José Ignacio Rodríguez, Chief Translator and Librarian of the International Bureau of the American Republics (See Vol. II, p. 207).

It would thus appear that so far as one may determine the limits of Chile from the boundaries as defined in the Constitution, the Bolivian Littoral was never within the territory of Chile until after the War of the Pacific.

(b) *The treaty with Spain.*—It should, moreover, be observed that the Government of Chile not only recorded in its Constitution, as above set forth, the limits which it has itself placed upon its territories, but it has, as late as 1844, stipulated for and adopted the same limits in a formal and solemn treaty concluded between itself and the Kingdom of Spain. Under the Treaty of Peace, Friendship, and Recognition between Spain and Chile, signed at Madrid, April 25, 1844, ratifications exchanged at Madrid, September 26, 1845, it was provided, in Article I, as follows:

"Art. I. Her Catholic Majesty, exercising the power with which she is invested by the Decree of the General Cortes of the Kingdom, of the 4th of December, 1836, recognizes as a free, sovereign, and

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<sup>a</sup> I Appendix, p. 356.

independent nation, the Republic of Chile, the same being composed of the countries specified in its constitutional law, namely, all the territory which extends from the Desert of Atacama as far as Cape Horn, and from the Cordillera of the Andes to the Pacific Ocean, together with the Chiloé Archipelago and the islands adjacent to the coast of Chile. And Her Majesty renounces both for herself, her heirs and successors, all pretension to the government, dominion, and sovereignty of the said countries."<sup>a</sup>

In the light of these repeated sovereign acts and expressions and in view of the historical facts regarding the colonial extent of Bolivia already set forth above, it is most difficult to perceive in what way the Government of Chile is able, with a due and proper consideration of the facts and circumstances involved, successfully to contend that she has always owned the desert of Atacama and that she, therefore, really re-possessioned herself of her own territory when in 1879 her troops overran and her Government assumed control of that region.

(c) *Treaties with Bolivia*.—The conclusions above reached are, it is believed, in no wise affected by the contention of the Chilean Government, as generally set forth above, that the treaties of 1866 and 1874 constituted a cession of territory from Chile to Bolivia and that, therefore, Bolivia is, in effect, estopped to deny that the desert of Atacama did not, prior to the treaty of 1866, belong to the Government of Chile rather than to the Government of Bolivia. It is submitted that a consideration of the treaties themselves do not bear out this contention of the Government of Chile as will appear from the following quotations.

In the Treaty of 1866 it was provided in the preamble as follows:

"The Republic of Chile and the Republic of Bolivia, desirous of bringing to a friendly and mutually satisfactory termination, the old question pending between them as to the settlement of their respective territorial limits in the desert of Atacama, and as to the working of the guano deposits on the coast of that desert, and resolved by this means to consolidate the good understanding, brotherly friendship, and the bonds of intimate alliance by which they are mutually united, have determined to renounce a part of the territorial rights which each, with good reason, believed themselves to possess, and they have agreed to conclude a Treaty, which shall finally and irrevocably settle the aforesaid question."<sup>b</sup>

It will be observed from this language that the contemplated arrangement is to be reached in order to bring to a "friendly and mutually satisfactory termination" the old question pend-

<sup>a</sup> I Appendix, p. 409.

<sup>b</sup> I Appendix, p. 417.

ing between them as to the settlement of their respective territorial limits *in the desert of Atacama* and that in order to reach this desired result the contracting parties "have determined to renounce a part of the territorial rights which each, with good reason, believed themselves to possess." It will be apparent from this quotation that the two Governments recognized the pendency between them of a dispute regarding their "territorial limits *in the desert of Atacama*." There is no statement whatsoever that the Government of Chile claimed *all* the desert of Atacama, and it will also be observed that this preamble recognizes that the contestants are prepared to surrender territorial rights "which each, with good reason, *believed* themselves to possess;" thus recognizing the reasonableness of the contentions of Bolivia regarding her ownership of territory *in the desert of Atacama*. It is difficult to perceive in what way this language can be considered as a recognition by the Government of Bolivia that that Government never had any rights in the desert of Atacama any more than it is a recognition that the Government of Chile recognized that it never possessed, prior to the treaty, any rights in the desert of Atacama. The language in these clauses is entirely reciprocal and whatever one renounces the other renounces—whatever the one retains the other retains. It is submitted, therefore, that so far as the preamble goes, and it is only in the preamble that any statement is made that could be considered as a "cession of territory," both Governments stand in the same position.

Moreover, this conclusion is not altered by the subsequent article which stipulates the boundary which shall thereafter be observed between the two Governments in the desert of Atacama. This article reads upon this point as follows:

"ART. I. The line of demarcation of the limits between Chile and Bolivia, in the desert of Atacama, shall henceforth be the parallel of 24° south latitude, from the coast of the Pacific to the eastern limits of Chile, so that Chile to the south and Bolivia to the north shall have possession and dominion of the territories which extend to the before-mentioned parallel of 24°, exercising in them all the acts of jurisdiction and sovereignty which belong to the lord of the soil."<sup>a</sup>

It will be observed that this expressly provides that to the south of the line and to the north of the line Chile and Bolivia respectively "shall have possession and dominion of the territories—exercising in them all the acts of jurisdiction and sovereignty which belong to the lord of the soil."

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<sup>a</sup> I Appendix, p. 418.

It is difficult to perceive in the face of this language how it can be successfully contended that the Government of Bolivia, by making this treaty, recognized in any way, even the slightest, a right in Chile to any territory north of the 24th degree of south latitude any more than (as has been already suggested) Chile recognized that Bolivia had a right to the territory south of the 24th degree of south latitude. It would seem, moreover, that the proper and reasonable interpretation of this treaty should be that each Government was willing to recognize that it made regarding sovereignty over territory claims which it was not able to substantiate and that a compromise was reached satisfactory to both parties, by which each Government gave up its extreme contention, and settled finally and definitively upon the 24th degree of south latitude as the boundary of their respective territories.

The Treaty of 1874 does not, in any way, change the legal status of the two parties. It provides in its preamble as follows:

"The Republics of Chile and Bolivia, being equally animated with the desire to consolidate their reciprocal and friendly relations, and to remove by means of solemn and friendly Treaties any causes which might tend to cool or paralyze them, have determined to conclude a new Boundary Treaty, which, modifying that concluded in the year 1866, may assure in the future to the Governments of both Republics the peace and perfect harmony necessary for their liberty and progress."<sup>a</sup>

It will be observed that this preamble, which in a way restates the inducements which led the parties to make a new treaty, makes no statement that the boundary recognized in the earlier treaty was not a due and proper boundary or that it was not a satisfactory boundary to both parties. On the contrary, it appears from Article I of this treaty that the boundary in the Treaty of 1866 was merely reaffirmed. This article reads:

"ART. I. The 24th degree of latitude from the sea to the mountain range of the Andes in the *divortia aquarum* is the boundary between the Republics of Chile and of Bolivia."<sup>b</sup>

It is difficult to perceive how language could be more specific upon the question as to the exact limits which are to be observed between the two countries, so far at least as such boundaries limit the district under discussion. Almost no boundary known to man can be determined with greater exactitude or which is less subject to change or alteration than that which is laid out along a parallel of latitude or a meridian of longitude.

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<sup>a</sup> II Appendix, p. 287.

<sup>b</sup> II Appendix, p. 288.

It is entirely evident, moreover, from the correspondence which accompanied the negotiations for the Treaty of 1874 that while the stipulations of the Treaty of 1866 that each should have "possession and dominion of the territories, exercising in them all the acts of jurisdiction and sovereignty which belong to the lord of the soil," were not repeated, yet each understood, save as to the inhibitions contained in the treaty itself, that this was the situation of each Government in respect to the territory on its side of the boundary. In a letter from the Chilean Chargé in Bolivia to the Bolivian Minister of Foreign Relations, under date of November 10, 1874, the Chargé, Don Carlos Walker Martinez, in commenting upon a national decree of the Bolivian Congress, which provided that "the guaranties to which the second paragraph of Article IV refers are extended to the capital, trade, and persons of the inhabitants of the Littoral," said:

"The extension to all the other inhabitants of the littoral of the rights which Article IV of the Treaty concedes to the Chileans presents no difficulty to me, since Bolivia is *mistress and arbiter, capable of making what laws she sees fit, and of favouring any she pleases*. The wish of my Government, in exacting the dispositions comprised in that Article, never was to leave other nationalities, nor the Bolivians themselves, in a worse position than the Chileans; its sole object was to give guaranties of stability and security to the trade and commerce of our country, opened up on such a large scale on the littoral of this Republic." (British and Foreign State Papers, vol. 71, p. 905.)

Again he said, in the same letter:

"Chile has never claimed to extend her limits to the other parts of the mountain range, *far less to seize from Bolivia one inch of her territory*. \* \* \* To the narrow-minded and suspicious persons who have reproached your Excellency with having ceded immense tracts of Bolivian territory in accepting the provisos of Article I, it would be well to reply that the Republic of Chile *desires nothing further* than to shut herself in between the sea and the mountains in order to obtain that which is her ambition; peace, well-being, and progress." [Op. cit. p. 906.]

The Government of the United States confidently submits that there is, in the history of the true limits and extent of the Bolivian territory along the coast, as also in the express treaty provisions of the treaties of 1866 and 1874 and in the correspondence which attended their negotiation and conclusion, absolutely nothing which, in any way, gives credit to the contention of the Chilean Government that that Government, prior to the Treaty of 1866 and



subsequent to its repudiation of the Treaty of 1874, actually possessed any rights whatsoever in the littoral north of the 24th degree of south latitude; and if it be that the contention of Chile is sound that her repudiation of the Treaty of 1874 restored the *status quo ante* of the Treaty of 1866, then by the very terms of the provisions of the Treaty of 1866 they were remanded to their original contentions,—that is, the contention on the part of Bolivia that her territory lawfully extended to the south of the boundary line fixed and the contention of Chile that her territory extended through the desert of Atacama on the north. Either this was the situation, or, and this is believed as the better view of the situation in which the parties found themselves upon the termination of the Treaty of 1874, the boundary limit provided in 1866 and reaffirmed in 1874 remained unchanged by the abrogation of the Treaty of 1874 and was, therefore, binding upon the parties.

It is finally submitted that in the face of these various agreements, above set forth, it can not be successfully contended that the Government of Chile is to be regarded as in any way entitled to the territory north of Paposo prior to the Treaty of 1866 between Chile and Bolivia; and that, therefore, any and all arguments and contentions based upon an alleged revindication of the Bolivian Littoral must fall to the ground.

(4) *But whether Chile's theory is correct or not, Bolivia had authority to negotiate the Wheelwright contract*—But granting for the sake of argument that all that has been said above regarding the original ownership of the Bolivian Littoral is erroneous, and that in point of fact and law the Government of Chile was the real sovereign of the territory comprised in the desert of Atacama during the time of the separation of the Spanish colonies, still it must be conceded that, under the Treaties of 1866 and 1874, when interpreted in accordance with the generally recognized rules of international law, the Government of Bolivia did, as of right, exercise in such territory a full and complete sovereignty at the time the Wheelwright contract was made, and that whether this exercise of sovereignty was *de jure* (as it is believed it was) or *de facto* (as it is believed it was not), still the Government of Bolivia had the power to grant to Wheelwright the concession of 1876.

The decisions of the courts and the expressions of text-writers are abundant to establish this. The question came before the Supreme Court of the United States as early as 1819 in the case

of the *United States v. Rice* (4 Wheaton 246, 253) at which time that court, by Mr. Justice Story, delivered the following opinion:

"The single question arising on the pleadings in this case is, whether goods imported into Castine, during its occupation by the enemy, are liable to the duties imposed by the revenue laws upon the goods imported into the United States. It appears, by the pleadings, that on the first day of September 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February 1815. During this period, the British government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and among others, admitted the goods upon which duties are now demanded. These goods remained at Castine, until after it was evacuated by the enemy; and upon the re-establishment of the American government, the collector of the customs, claiming the right to American duties on goods, took the bond in question from the defendant, for the security of them.

"Under these circumstances, we are all of opinion, that the claim for duties can not be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States.

"The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable, at the time of importation is clear, from what has already been stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been, if Castine had been a foreign territory, ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority."

The Courts of Great Britain laid down the same principle in the case of *United States of America v. Prioleau*, 1866 (35 Law Journal, Chancery, N. S. p. 6, 9.) in which Vice Chancellor Wood made the following statements:

“There are one or two points which, I think, are tolerably clear in this case. The first point is with reference to the right of the United States of America, at this moment, to the cotton, subject to the agreement. I treat it first in this way. It has scarcely been disputed on the present argument, and could hardly be disputed at any further stage of the inquiry, that the right is clear and distinct, because the cotton in question is the admitted result of funds raised by a *de facto* government, exercising authority in what were called the Confederate States of America; that is to say, several of those states which, in union, formerly constituted the United States, and which now, in fact, constitute them; and that *de facto* government, exercising its powers over a considerable number of states (more than one would be quite enough), raises money—be it by voluntary contribution, or be it by taxation, is not of much importance. The defendant Prioleau, in cross-examination, admits that they exercised considerable power of taxation; and with those means, and claiming to exercise that authority, they obtained from several of the States of America funds by which they purchased this cotton for the use of the *de facto* government. That being so, and that *de facto* government being displaced, I apprehend it is quite clear that the United States of America (that is to say, the government which has been successful in displacing the *de facto* government, and whose authority was usurped or displaced, or whatever term you may choose to apply to it), the authority being restored, stand, in reference to this cotton, in the position of those who have acquired, on behalf of the citizens of the United States, a public property; because otherwise, as has been well said, there would be nobody who could sue in respect of, or deal with, property that has been raised, not by contribution of any one sovereign state (which might raise a question, owing to the peculiar constitution of the Union, if it had been raised in Virginia or Texas, or in any given State), but the cotton is the product of levies, voluntary or otherwise, on the members of the several states which have united themselves into the Confederate States of America, and which are now under the control of the present plaintiffs, and are represented, for all purposes, by the present plaintiffs. That being so, the right of the present plaintiffs to this cotton, subject to this agreement is, I think, clear, because the agreement is an agreement purporting to be made on behalf of the then *de facto* existing government, and not of any other persons. That case of *The King of the Two Sicilies* and the case of *The King of Spain*, and other cases of the same kind, which it is not necessary to go through, shew that whenever a government *de facto* has obtained the possession of property, as a government, and for the purposes of the government *de facto*, the government which displaces it succeeds to all the rights of the former government, and, among other things, succeeds to the property they have so acquired.

“Now I come to the second head of the question, and I confess at this moment, as at present advised (of course it will be

opened to more argument hereafter), I do not feel much doubt on the subject, namely, the question whether or not, taking this property, they must or must not take it subject to the agreement. It appears to me, at present, they must take it subject to the agreement. It is an agreement entered into by a *de facto* government, treating with persons who have a perfect right to deal with them. I apprehend if they had been American subjects they might do so. One of them, Prioleau, is not an American subject (at least I have no evidence that he is); he is a naturalized British subject; he would have a perfect right to deal with a *de facto* government; and it cannot be compared with any one of those cases Mr. Gifford put, of persons taking the property of another with knowledge of the rights of that other. That is a species of argument that cannot be applied to international cases of this description, and for a very good reason; if so, there would be no possibility during the existence of a government *de facto* of any person dealing with that government in any part of the world. The courts of every country recognize a government *de facto* to this extent, for the purpose of saying—you are established *de facto*, if you are carrying on the course of government, if you are allowed by those whom you affect to govern to levy taxes on them, and they pay those taxes, and contribution is made accordingly, or you are acquiring property, and are at war, having the rights of belligerents, not being treated as mere rebels by persons who say they are the authorized government of the country. Other nations can have nothing to do with that matter. They say we are bound to protect our subjects who treat with the existing government; and we must give to those subjects, in our country, every right which the government *de facto* can give to them, and must not allow the succeeding government to assert any right as against the contracts which have been entered into by the government *de facto*; but, as expressed by Lord Cranworth in the case referred to, they must succeed in every respect to the property as they find it, and subject to all the conditions and liabilities to which it is subject and by which they are bound. Otherwise, I do not see any answer to Mr. James's illustration, and I do not see why there should not have been a bill filed to have the *Alabama* delivered up; \* \* \* because on the theory of the present plaintiffs, it was their property just as much as their cotton is now. If the case had been this (and it is the only case I can consider as making any difference, but that difference would be fatal to the plaintiff's case in another point of view): if they had been a set of marauders, a set of robbers (as was said to be the case in the kingdom of Naples, truly or untruly), devastating the country, and acquiring property in that way, and then affecting to deal with your subjects in England, it would not be the United States, but the individuals who had been robbed and suffered, who could come as plaintiffs. That would be fatal to the claim of the United States as plaintiffs. The United States could only come to claim this because it has been raised by public contribution; and although the United States, who are now the government *de facto* and *de jure*, claim it as public property, yet it would not be public property unless it was raised, as I have said, by exercising the rights of government, and not by means of mere robbery and violence.

"I confess, therefore, I have so little doubt, that this agreement is one that would be binding on the plaintiffs, that I cannot act against these gentlemen without securing to them the reasonable benefit of this agreement; and I cannot put them under any terms which would exclude them from the reasonable benefit of what they are entitled to, and must be held entitled to, as I think, at the hearing of the cause."

In a question which arose before the United States and Venezuelan Claims Commission of 1885, Findlay, Commissioner, in the case of Beales, Nobles & Garrison, discussed this question in the following language:

"It may also be stated, with great confidence, that a government *de facto*, when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is styled a government *de jure*. Indeed, as Austin has pointed out, every government, properly so called, is a government *de facto*. A government *de jure* but not *de facto*, says he, is that which *was* a government, and which, according to the view of the speaker *ought* still to be a government, but, in point of fact, is not. (Austin, Juris. vol. 1, 336)." [Moore International Arbitrations, Dig., v. 4, p. 3553.]

Finally, the matter has been very succinctly and definitely set forth by Wheaton in his Elements of International Law (page 50, 8th edition, by Dana), where he says:

"So, also, where foreign governments and their subjects treat with the actual head of the State, or the government *de facto*, recognized by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were the acts of him who is considered by the restored sovereign as an usurper."

### Conclusion.

It is therefore submitted that from whatever view point the question is observed, it is still conclusively demonstrated that in making the contract of 1876, the Government of Bolivia acted entirely within its sovereign rights *de facto* or *de jure* as the case may be, and that therefore those rights, being private rights, were legally and properly conferred upon Wheelwright, and were such rights as must receive consideration and protection by the sovereignty succeeding that of Bolivia.

### *Sub-Point B.*

The rights, titles, and interests in said government estacas, granted by the Bolivian Government to Wheelwright, by and under the contract of December 26, 1876, constitute a concessionary grant analogous and equal to a leasehold for years; but said rights, titles, and interests do not constitute and were not intended to constitute an estate or interest identical with or equivalent to a common law or civil law mortgage, nor to a contract of anticresis either under the code of Chile or under the general principles of the civil law.

### *Prefatory Summary.*

The discussion following will show that under the contract of 1876, provision was made for two distinct matters: First, the contract recognized as due Wheelwright a certain sum specified, which was to draw interest as provided, and also recognized as due a further sum as accrued interest, and secondly it provided in express terms for a lease of all the government mines, located in the Littoral, for a period of twenty-five years. This latter phase of the contract constituted a mining concession. This mining concession was, as just stated, in the form of a lease for a term of twenty-five years, and was granted in accordance with the strict provisions of Bolivian law authorizing the grant or lease of the government mines. The terms of this lease were such that, of the net proceeds of the mines, the concessionaries took 60 per cent as profit and a return for their risk, the other 40 per cent of the net proceeds going to the Government of Bolivia. It was also and further stipulated that the 40 per cent going to the Bolivian Government should be applied to the payment of the debt recognized in the other part of the Wheelwright contract, until such debt should be paid.

This contract was exactly analogous to an earlier contract made between Pedro Lopez Gama and the Government of Bolivia, it being provided in the Gama contract that the concessionaries and the Government should share the net proceeds equally. A prior contract between Gama and the Bolivian Government regarding a debt due from the Government to Gama had provided for the payment to Gama of 25 per cent of the share which should come

to the Government as the result of the contemplated leasing of the mines, which lease was afterwards actually made to Gama.

In view of what is said above, it is clear that this Wheelwright contract does not constitute a mortgage, since it is not a "*security*" for a debt, it being at most a *source* from which a debt is to be paid. The Government of Chile also insists upon this point. Moreover, it is not a contract of anticresis, since the proceeds of the mine do not go entirely to the liquidation of the debt, because a part thereof belonged to the concessionary; and, further, there is no relationship between the payment of the debt and the duration of the contract, and therefore by paying the contract debt the Government of Bolivia would not have become entitled to the possession of the mines until the expiration of the lease. This becomes clearly evident from the nature of anticresis, as that has been set forth and commented upon by civil law writers.

Finally, it is clear from the various laws and decrees under which this contract was made that the National Executive was not authorized to make an anticretal contract of the mines, but was simply authorized to sell or lease them; and that the Bolivian Government has interpreted the contract as being a leasehold in which the state was interested as a partner, Wheelwright being designated as the "administrator of the Society."

### *Discussion.*

An examination of the provisions of these decrees as above set forth will show that they provide for and grant the following rights, titles, and interests:

*First.* The contract gave to Wheelwright, representing the concessionaries, the exclusive right to possess and operate such of the "Estacas de Instruccion Publica" located in the Littoral, or Coast Department, of Bolivia, as he (Wheelwright) should within a period of three years from the date of the contract select (Art. I, Decree of Dec. 23, 1876), provided that in case he failed to work any of the estacas he had designated such estacas might be operated by other persons, if Wheelwright stated in writing to the Government that he did not care to undertake the operation of such estacas, or if he deliberately neglected to make such statement. (Art. 7, Decree of Dec. 23, 1876).

*Second.* The contract conveyed to Wheelwright for the concessionaries an absolute right to hold, possess, and operate these mines,

under the provisions of the contract, for a period of twenty-five years from the date of the contract. (Art. 6, Decree of December 23rd).

*Third.* The contract stipulated and provided that the net proceeds to be derived from the operation of these mines were to be divided in the following proportion: 40 per cent was to go to the Government of Bolivia and 60 per cent to the lessees (Art. 4, Decree of December 23; Art. 3, Decree of Dec. 24).

*Fourth.* The contract further stipulated and provided that said 40 per cent of the net proceeds belonging to the Government should be and was thereby appropriated, set aside, and applied to the payment of the 835,000 bolivianos, with interest at 5 per cent, recognized as due by the contract (Art. 4, Decree of December 23d, and Art. 3, Decree of December 24th.)

*Fifth.* The contract stipulated and provided that the lessee was to pay to the Government of Bolivia at the expiration of the leasehold interest (that is, at the expiration of twenty-five years from the date of the contract) such remaining sum or sums of the said 40 per cent belonging to the Government of Bolivia as were left after paying off, in accordance with the plan agreed upon, the debt of 835,000 bolivianos with interest recognized by the contract as due from the Government of Bolivia to the concessionaries. (Art. 6, Decree of December 23rd.)

*Sixth.* The contract contained a special provision stipulating for the liquidation of the accrued interest recognized under the contract, by providing that this interest was to be met, if met at all, by the sums realized from the operation (though under another and different plan for the distribution of the net proceeds) of two mines, one of which was named in the contract. (Arts. 3 and 4 of Decree of December 24th.)

*Seventh.* The concessionaries were to hold the mines for a full period of twenty-five years (Art. 6, Decree of December 23rd) and it was immaterial to the life of the lease whether or not the debt was paid. Indeed the contract contemplated, as is shown by express words (Art. 6, Decree of December 23rd), that the debt would be paid before the expiration of the twenty-five years, and provided for the distribution of the proceeds in such an event.

In connection with the consideration of the nature of the interest in the Government mines in the Bolivian Littoral which these decrees vested in John Wheelwright, as Liquidator of Alsop & Co., and the relationship between this interest and the debt (principal and interest) recognized by the Decree of December 24,



1876, as due to the said Wheelwright, representing the liquidating firm of Alsop & Co., it is of interest to note a similar arrangement which Pedro Lopez Gama (the assignor of the indebtedness recognized by this contract) had made for the liquidation of this same general credit against the Bolivian Government.

It appears that in December, 1872, the Government of Bolivia entered into a contract with Don Pedro Lopez Gama, which, *inter alia*, recognized as due to Gama from the Government of Bolivia a certain specified indebtedness and stipulated therein that it would liquidate the sum recognized as due, by the application thereto of 25 per cent of the net profits which should come to the State from the working of the government estacas, a concession for the granting of which was to be made on the first of April following.

Three persons, one of whom was Gama, offered bids under the adjudication which took place on the first of April, in accordance with the plan above stated. The contract was awarded to Gama and the government estacas in the Coast Department were turned over to him for exploitation under a separate and distinct instrument, apparently having no connection whatsoever with the contract of December 21, 1872, above referred to. The instrument leasing to Gama the mines reads as follows:

*"A proposal which Pedro Lopez Gama makes to the Supreme Government of Bolivia in regard to the work and exploiture of the Estaca-Mines of silver, which belong to the State in the Littoral of the Republic by virtue of the Supreme Decree of the 19th of September 1872.*

"BASES OF THE PRESENT PROPOSAL.

*"First.* Pedro Lopez Gama, for himself or through collective or anonymous societies, for the formation of which he is duly authorized, assumes the working and exploiture of all the Estaca Mines which belong to the State, which in the judgment of the management [will] bear at least the cost of working in the veins already discovered or which hereafter shall be discovered in the Littoral of the Republic of Bolivia, subject to the Code of Mining.

*"Second.* The Manager, Pedro Lopez Gama, binds himself to begin work six months after the signing of the instrument of the present contract, or earlier, if he should find it expedient, after the delivery and taking possession of the Estaca-Mines, which have been surveyed by national engineers or engineer, at the veins which are known and worked; the operations to begin in the Estaca-Mines which the Company may indicate.

*"Third.* The Supreme Government of Bolivia shall give the respective orders to the Littoral authorities, as well as to the engineers

or engineer of the Nation, so that, expediting the survey of the 'Estacas' of the State in the veins already discovered, they may monthly give over possession to the Manager the greatest possible number of them. To better facilitate this operation, and especially in cases where the direction of the veins of the Estaca of the State might have turned off, and where therefore their direction might have been badly taken, the Manager binds himself to lend to the engineer of the State the cooperation of the engineers of the Company.

"*Fourth.* The Manager can contract and employ for the service of the works engineers, employees and working men, be they foreigners or nationals; who during the time of their respective contracts with the Management shall be exempt from all military service and all civil and public demands.

"*Fifth.* The Manager, Pedro Lopez Gama, binds himself to employ or cause to be employed by the Companies which he might form, by virtue of the authority contained in Art. 1 of the contract, all the capital that may be necessary for the developement of the enterprise on a great scale.

"*Sixth.* The Manager, Pedro Lopez Gama, offers as a guaranty for the faithful fulfilling of this contract, besides the Credit which the Supreme Government of Bolivia has acknowledged due to him upon the product of said Estaca-Mines, a loan of one million two hundred and fifty thousand pesos at an annual interest of 8%, at 6% amortization and 1% commission. Said 1,250,000 shall be collected by the Manager from the office of the National Bank of Bolivia in Valparaiso in the following manner: 250,000 pesos three months after ratifying of this contract, 500,000 three months thereafter and the remaining 500,000 six months after the payment of the previous quota.

"*Seventh.* The net profit which the working and exploitation of the Estaca-Mines, to which this contract refers, produce, according to half yearly balances which the Management shall present, shall be distributed between the Government and the Manager in the following manner: fifty per cent (50%) for the State and fifty per cent (50%) for the Management.

"*Eighth.* Of the fifty per cent belonging to the State shall be deducted that part which is destined for the payment of the credit which has been acknowledged in favour of the one making the Proposal, according to the Supreme Decree of the 21st of December 1872; as also that which will be necessary to cover the payment of interests, commission and amortization of the loan expressed in the clause 6 of this contract; and the balance which results in favour of the State, shall be to the order and disposal of the Supreme Government.

"*Ninth.* The Supreme Government may appoint, if it judge expedient, an Interventor or Official Agent, who may act as attorney in all the operations of the Company; it being understood that the initiative and direction of the works and the management of the business in general, pertain exclusively to the Company.

"*Tenth.* The Company is authorized to sell or to utilize the metal which it exploits in the market which best suits it, be it in the Republic or outside of it.

"*Eleventh.* The Company, to make effective its rights, shall enjoy all the privileges which the Fiscal enjoys.

*"Twelfth. The duration of this contract shall be for the term of fifty years.*

*"Thirteenth. The State shall be considered as a social partner, and in its quality as such is not responsible for the losses which the Company might suffer.*

*"Fourteenth. During the fifty years duration of this contract, the Supreme Government of Bolivia cannot contract, sell, rent, alienate nor exploit any of the Estacas of the State which they own at present or may own hereafter in all the territory to-day known as the Littoral, where the mineral deposits of Caracoles and others are found.*

*"Fifteenth. The Supreme Government shall order all the local authorities of the Littoral to contribute by all means in their power, to help the engineer or engineers of the State to safe-guard the property and persons of the Company; and especially it shall recommend them to fulfill Art. 9 of the Supreme Decree of the 19th of September last, in which it recommends the taking of the most efficient means to protect the Estacas of the Nation from usurpations and trespass on the part of miners.*

*"Sixteenth. If the protection which the authorities of the Littoral could give may not be sufficient to safe-guard the properties and persons of the Company, taking into consideration the distance which exists between the mines, the incomplete police organization, and the distance between the coast and the mines, the Company is authorized to organize its own police security and to furnish escort for its shipments to the journey's end.*

*"Seventeenth. To meet cases of usurpation or operation upon any of the Estaca-Mines of the State, the Supreme Government, at the time of notification to the authorities of the Littoral of the celebration of this contract, shall indicate to them the shortest and most decisive means how they should proceed to effect the handing over of such estacas as should have been usurped or worked by others at the time of the giving over of them to the Company.*

*"Eighteenth. The Supreme Government grants in favour of the Company during the term of this Contract such land, property of the State, as it may need for the erection of its houses and establishments.*

*"Nineteenth. In the unexpected case that there should be any difference of opinion between the Supreme Government and the Company as to the meaning of this contract, the question shall be resolved by two arbitral judges, selected by either party, but if the referees should not agree between themselves, the two contracting parties shall elect an umpire to whose decision both contracting parties shall submit themselves without appeal.*

*"La-Paz, April 1st, 1873.*

*"(Signed.)*

PEDRO LOPEZ GAMA."

"In La-Paz de Ayacucho, on the 1st of April 1873, at 2 p. m., this being the day appointed by the Supreme Decree of the 19th of September ultimo to consider the bids for the Company to work and exploit the Estaca Mines of the State in Caracoles, the Board of National Auctioneers, composed of the Ministers of State, with the exception of the Minister of Government, who was absent on account of sickness, and in the presence of the President and Dean of the Council of State, who were called for that purpose, and of the Fiscal

(Attorney) of the District, the President of the Republic presiding, proceeded to the opening of three sealed papers, the only ones that were presented at the hour appointed by the aforementioned decree, the first one containing: the proposal of Messrs. George Earl Church, Emile Erlanger and Julius Beer; the second that of Mr. Pedro Lopez Gama; and the third that of Mr. Narciso Noriega, attorney for Mr. Carlos von der Heyde.

*"The three proposals having been read and examined at the same time, and after a ripe discussion, the Board qualified the one of Mr. Pedro Lopez Gama as the one most advantageous to the State and which offered the most simple combination; in consequence, it was accepted in preference to the other proposals, the Board enlarging Art. 17 in the following terms:*

*"Article 17. In case of usurpation, penetration into any of the estacas of State, or of deviation of the veins, the Supreme Government shall name a commission of judges, who in consort with those whom in equal number the interested parties shall nominate, and after previous information to the engineers or specialists of both parties, shall resolve according to equity and justice all questions which shall arise between the mining proprietors and the State by reason of said estacas.*

*"To this end the Government demands of all mine proprietors to present their titles in the mining District of Caracoles, to the end that they may be transcribed into the public registers, and thus facilitate the decisions of the arbiter-committee."*

"The Board also disposed that the proposals should be handed to the Minister of Finance for their publication, and that he order the execution of the writing of the contract with Mr. Lopez Gama, as also that he give the orders which would lead to its execution.

"Signed by the gentlemen present and by the President of the Republic.

"FRIAS.

"P. GARCIA.

"JUAN DE DIOS BOSQUE.

"ILDEFONSO SANJINES.

"MARIANO BAPTISTA.

"JOSE M. DEL CARPIO.

"JOSE VICTOR PEREZ.

"MANUEL VIRREIRA,

*"Chief Officer of the Treasury."*

"MINISTRY OF FINANCE AND INDUSTRY,

*"La Paz, April 2, 1873.*

"Send to the Prefect of the Department the contract of Mr. Pedro Lopez Gama, that he cause the said gentleman to be notified of the previous resolution, and in consequence the public instrument be made out before the Notary Public of Finance of the Department: Publish the three proposals which have been presented, together with the minutes of acceptation of that of Mr. Pedro Lopez Gama; transcribe to the Prefect of the Department of Cobija, and give the respective orders for the fulfillment and execution of the referred contract.

"GARCIA,"<sup>a</sup>

It will be observed that these documents provide, first, for the leasing of the government estacas for a period of fifty years under and pursuant to the earlier decree of September 19, 1872, which authorized the consideration of bids for the working and exploitation of the government mines; secondly, that it provided that the proceeds should be divided, fifty per cent to Pedro Lopez Gama and fifty per cent to the Government; thirdly, that the portion going to the State was by these documents appropriated (a) to the payment of the credit acknowledged in favor of Gama by the decree of 1872; (b) to the payment of a loan made contemporaneously with the execution of this contract; (c) the balance was to go to the National Treasury. Moreover, the company was to enjoy the rights enjoyed by the Government, that is, stand in the place of the Government; the State was to be considered as a social partner; and the concessionary was to be placed in possession of those mines which had been "usurped by private parties," as well as have rights against those who had penetrated from adjacent mines into the government estacas and taken ore therefrom,—questions arising under both headings to be resolved "according to equity and justice" by a board therein constituted.

It is obvious at a glance that there is no relationship between this contract and the prior credit of Gama or the credit created by that instrument, save that the portion of the Government's share of the net proceeds resulting from the operation of the mines should be applied to the liquidation of these debts; and, so far as the liquidation of the Gama credit of December, 1872, is concerned, Gama would have stood as to the Government's share, had the contract been given to either of the other two parties, just as he stood under his own contract.

The agreement between Wheelwright and Bolivia, as set forth in the two decrees of December 23rd and 24th, which became the essential part of the contract of December 26, 1876, embodies an arrangement exactly and precisely similar to the arrangement made with Pedro Lopez Gama.

A study of the contract of December 26, 1876, will show, as already indicated above, that it consists of two essential and distinct elements which touch one another and overlap at one point only. In the first place, this contract recognizes as due to John Wheelwright as liquidator of Alsop & Co., a debt of 835,000 bolivianos (to draw interest at 5 per cent per annum until paid)

together with a certain specified amount of accrued interest and provided methods of payment for these sums, one of which was by appropriation thereto of a part of the income to be derived from the operation of the government mines. This is equivalent to the Gama contract of December, 1872. In the second place, this contract of 1876 embodied and constituted a concession or lease to Wheelwright of the government estacas formerly leased to Gama, as above set forth. This is equivalent to the Gama concession of April 1st, 1873. The terms of the lease in this case have, however, been changed so that in place of the provision of the Gama contract which gave to the Government 50 per cent of the net proceeds from the operation of the mines, the Wheelwright contract gave to the Government but 40 per cent of the net proceeds from the operation of the mines, Wheelwright, representing Alsop & Co., being entitled to the other 60 per cent of the net proceeds as a compensation for his operation of the mines. The provisions of this lease also differed from the provision of the Gama contract in that it provided that all, instead of one-fourth, of the Government's share should be applied to the liquidation of the principal debt until such debt should be entirely paid, principal and interest.

It becomes obvious from this analysis of this side of the Wheelwright contract that the concessionaries had two sources to which to look for the discharge of the obligation recognized by the contract. First, the customs receipts of the Arica Custom House, and the correspondence of the parties in interest plainly shows that it was to this source that the concessionaries primarily looked for the discharge of their obligation; secondly, the Government's share of the net proceeds which might be realized from the operation of the government estacas in the Bolivian Littoral. This latter arrangement is, as already stated, precisely the same sort of a contract as that which was entered into between Gama and the Bolivian Government in 1873, and it is not in terms or in effect a pledge, or mortgage, or hypothecation of the mines of the Bolivian Littoral for the payment of the debt, whether contemplated from the fundamental principles of the common law, or the like principles of the civil law, as will appear from the following analysis and examination of authorities.

It is elemental under the common law that in a pledge or mortgage the thing pledged or mortgaged is given as *security* for the debt and not in *liquidation* of the debt; that, save perhaps in the Welsh mortgage, to-day almost obsolete, the mortgagor never looks

to the thing mortgaged for the satisfaction of his obligation, principal or interest, except only when the debt is due and the creditor fails to meet the same and the thing pledged or mortgaged is, under the modern practice, sold, i. e., foreclosed, and the proceeds applied to the payment of the debt. It is clearly evident from an examination of its provisions that the Wheelwright contract of 1876 does not in terms nor in effect convey to Wheelwright anything that in any way resembles a mortgagee's interest in property mortgaged to him as security for the debt due to him from the debtor. On the contrary, the relationship existing between Wheelwright and the Government of Bolivia is the same relationship which would exist between A and B in a case stated as follows:

A, owing B, leases to B his, A's, farm for a period of twenty-five years, under an agreement which provides that B shall take 60 per cent of the net proceeds of the operation (working) of the farm, and that A shall take 40 per cent of the net proceeds of the operation of the farm, with a stipulation that the 40 per cent belonging to A shall be applied to the debt due from A to B until said debt is paid, after which the 40 per cent shall go to A. In this case there is no relationship whatsoever of mortgagor and mortgagee. It is a simple case of lessor and lessee. The lessee has the right to the farm under his lease for the period of twenty-five years, irrespective of the question of the payment of the debt due from A to B. If the debt is paid in five years, then the 40 per cent goes directly to A, for the balance of the term, viz., for twenty years. If the debt is not paid in twenty-five years, or at the end of the lease, B surrenders the leasehold and has still an obligation against A for the balance of the debt then unpaid, which balance is not affected in any way by the surrender of the lease, and there is in such contract nothing in the nature of a right of foreclosure should the debt remain unpaid at the expiration of the lease.

This is precisely the nature of the interest which was held by Wheelwright for the concessionaires in the government estacas of the Bolivian Littoral. The concessionaires were to hold the mines for a period of twenty-five years. During these twenty-five years they were to retain 60 per cent of the net proceeds of the operation of the mines and were to turn over to the Government of Bolivia the balance, or 40 per cent of the net proceeds derived from the operation of the mines. The 40 per cent belonging to Bolivia under this contract was to be applied to the payment of the debt recognized as due by the contract, so long as any part of that debt remained unpaid. If the debt were paid in full before

the expiration of the twenty-five years, the 40 per cent accruing to the Government of Bolivia after the payment of the debt was to be paid to the Government of Bolivia. This arrangement not only does not constitute but does not resemble a mortgage.

The Government of Chile has more than once recognized this fact, and in the note of the Minister of Foreign Relations of Chile to the American Minister at Santiago, dated April 9, 1908, the position of the Government of Chile upon this point was set forth as follows:

"However, the liberality of my Government in assuming the settlement of this claim by paying a considerable part of it was not duly appreciated by the representative of this firm, who, not being satisfied with the amount assigned to him in the Treaty of Peace, claimed, as the Chilean Minister at Washington saw fit to express it on more than one occasion, that by reason of the fact that *this debt was secured by property* situated in the Territory acquired by Chili in virtue of this same Treaty, my Government was under obligation to pay it in its entirety.

*"Your Excellency will realize how inadmissible such an argument is if you consider the fact that the security for the Alsop claim is, like that of many creditors of the Bolivian Government, not a civil law mortgage, but simply a financial guaranty given by the nation for the purpose of insuring the fulfillment of a contract."*<sup>a</sup>

That the contention thus set forth by the Government of Chile, to the effect that this Wheelwright contract in so far as it affects the mines of the littoral is not a civil law mortgage, is a correct interpretation of the civil law governing this question seems certain, from a consideration of the fundamental principles of the civil law as they were understood and enforced in the old Roman law. (See Moyle's Institutes of Justinian, Excursus 2.)

It must therefore be conceded as established not only from a consideration of the instrument itself but also from the contention of both the United States and Chile that the Wheelwright contract not only does not purport to convey, but does not in fact create or convey, any right, title, or interest to the littoral mines which under the principles of either the common law or the civil law may be properly designated as a mortgage.

It should, however, be observed that the court of second instance at Antofagasta in the case of the *Justicia*, (hereinafter discussed at some length) held upon the question of the nature of the contract of 1876, as follows:

"1. That the convention celebrated in the City of La Paz on the 26th December, 1876, between the Government of the Republic of

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<sup>a</sup> I Appendix, p. 137.



Bolivia and Mr. John Wheelwright, representative of the firm of Alsop & Company, is a contract of '*anticresis*,' by which convention there was recognized in favor of this firm a debt of 835,000 Bolivian dollars, and there were adjudicated to him the *estaca* mines of silver belonging to the State in the Coast Department, in order that the said debt should be paid with 40 per cent of their net products during the term of 25 years."<sup>a</sup>

It is believed that this decision of the court is not sound in law, and for the following reasons:

In the first place the Code of Chile defines the term "*anticresis*" as follows:

"Art. 2435. *Anticr sis* is a contract whereby there is delivered to the creditor a real property in order that he may pay himself out of its proceeds."<sup>b</sup>

After stipulating several general provisions regarding contracts of *anticresis*, the code further provides in Article 2444 as follows:

"Art. 2444. The debtor cannot request the restitution of the property given in *anticresis* except for the entire satisfaction of the debt; but the creditor may restore it at any time and pursue collection of his debt by the other legal methods without prejudice to what may be stipulated in the contract."<sup>b</sup>

That the Wheelwright mining contract of 1876 was not a contract of *anticresis* within the meaning of the provisions of the Chilean code, above cited, is evident from the following considerations:

In the first place, Article 2435 provides that the creditor takes over the property "in order that he may pay himself out of his proceeds." As has been already pointed out the Wheelwright contract is not, in its essence, a contract negotiated and concluded in order that Wheelwright might satisfy himself out of its proceeds. On the contrary it must be observed that Wheelwright evidently expected to have his debt paid from the Arica customs and the appropriation of the Government's percentage of the net proceeds resulting from the operation of the Government's mines was merely an additional source to which he might look in order to secure the more rapid liquidation of his debt. The Wheelwright mining contract of 1876 was essentially a concessionary grant, under which but a portion of the proceeds would, in any event, be applied to the debt, the balance of the proceeds going to the concessionaries as a return upon the risk which they took and the investments which they made in the operation of the mines. This mining concession was purely a mining venture identical in its character, as has already been pointed out, with the arrangement between Gama and the Bolivian Government of 1873.

<sup>a</sup> II Appendix, p. 118.

<sup>b</sup> I Appendix, p. 357.

Again, the Wheelwright contract fails to meet the requirements of the first clause of Article 2444, as above quoted, which provides that "the debtor cannot request the restitution of the property given in anticresis except for the entire satisfaction of the debt."

A perusal of the contract will show that there is absolutely no relationship between the duration of the mining contract and the satisfaction of the debt. The contract was to run for a period of twenty-five years, during which time the proceeds due the Government under the contract were to be appropriated and applied to the payment of the debt so long as any portion of that debt remained unpaid, after which this share was to go directly to the Government of Bolivia. The discharge of the debt gave to the Government of Bolivia absolutely no right to demand the surrender of the government estacas held by the concessionaries until the end of the lease. If the debt had been paid by the middle of 1882, as it would have been had the Government of Chile not intervened, still the contract would have continued to exist and still the concessionaries would have retained possession of and operated, had they so chosen, the government mines in the Littoral up to and including the expiration of the twenty-five years of the lease, namely, 1901. As a matter of fact, the only seeming analogy which exists between the Wheelwright contract and the contract of anticresis is the fact that the contract provides that the Government's share of the proceeds resulting from the operation of the mines may be applied to the payment of the debt and that this seeming analogy is false in essence becomes only too evident when an analysis of the contract is undertaken.

It is, therefore, confidently asserted that even under the provisions of the Chilean Code the contract of 1876 cannot be regarded as a contract of anticresis.

But not only does this contract fail to satisfy the technical requirements of a contract of anticresis as thus set forth in the Chilean Code, but it also fails to satisfy the requirements of an anticretal contract under the general rules and requirements laid down by writers and commentators upon the general principles of the civil law.

Escrive, in his Dictionary of Legislation and Jurisprudence, discussing the subject of "anticresis," makes, *sub voce*, the following comments:

"ANTICRESIS: A contract whereby the debtor places in control of the creditor a real or immovable thing, with the right to receive its proceeds until with their value payment of the debt is made;

and more especially a contract in which the debtor consents that his creditor enjoy the fruits of the heritage which he delivers to him in place of the interest on the money which he has loaned from him until he pays him his debt. *Anticresis* used commonly to be called a contract of "a use for a use" (*gazar y gazár*) because one gives the use (enjoyment) of a producing thing and the other gives the use (enjoyment) of his money."<sup>a</sup>

It will be observed that in no particular does the Wheelwright contract satisfy the requirements of the contract of anticresis as thus set forth. The accuracy of this assertion is apparent when it is considered that,

First, this contract did not give the "right to receive its proceeds until with their value payment of the debt is made," since the contract in the first place does not provide for the application to the liquidation of the debt all of the proceeds resulting from the operation of the mines, but, on the contrary, applies but a portion of the proceeds to the liquidation of the debt—the other portion of the proceeds going to the concessionaries as compensation for their undertaking. In other words, to repeat again what has already been pointed out above, the Wheelwright contract, so far as the mines were concerned, was a mining concession, under which Wheelwright was to operate the mines by an arrangement which provided that a certain percentage of the proceeds should go to the concessionaries as a profit upon their undertaking, and the balance of the proceeds should go to the State as a consideration for the rights granted to Wheelwright under the concession. As a subsidiary and auxiliary matter purely, the object being merely to provide an additional source from which, if necessary, the debt due from the Bolivian Government to the concessionaries might be met, the contract also provided that the percentage due to the Bolivian Government under the contract should be applied to the payment of the debt due to the concessionaries. This latter arrangement was, however, independent of and in addition to the concession itself, which provided merely for the leasing of the mines and the division of the net proceeds.

Further, to repeat again, there was absolutely no relationship between the payment of the debt and the duration of the contract. Indeed, the contract in terms expressly recognized that the debt might be discharged before the expiration of the leasehold term and specifically provided for the disposition of the fund belonging to Bolivia under the concession in such an event. It will thus be perceived that this mining contract does not, as a

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<sup>a</sup> I Appendix, p. 365.

contract of anticresis requires, give a right to receive its proceeds *until with their value payment of the debt is made.*

Secondly—This is not a contract under which the Bolivian Government took the use of the money and Wheelwright the use of the mines with the understanding that it was a “use for a use.” On the contrary, it was distinctly provided that the debt should draw interest, notwithstanding Wheelwright had the use of the government mines. This fact but emphasizes the contention just set forth that there is absolutely no relation between the mining concession and the debt, save that it was provided that the sum due Bolivia under the mining concession should, until the debt was paid, be applied thereto, and that the concession existed independently of the debt, and that the debt might survive the running of the leasehold term. Therefore, this is not a “contract in which the debtor consents that his creditor enjoy the fruits of the inheritance which he delivers to him in place of the interest on the money which he has loaned from him until he pays his debt.” The leasehold term was separate and distinct from and wholly independent of the payment of the debt, and continued or terminated irrespective of the payment of the debt.

Again Escriche says:

“If the law wishes to safeguard, as it is supposed, the interests of the debtors, it had much better forbid them the sale with a right of repurchase (a *Carta de gracia*) than *anticresis*. *Anticresis* is usually less disadvantageous for the debtor than such sale. By the sale a debtor is dispossessed, not only of the proceeds, but also of the ownership of his property but by *anticresis* he is only deprived of the proceeds; by the sale the buyer always acquires the right of receiving all the proceeds no matter what they may be and by *anticresis* the creditor cannot receive any of the proceeds but what are apportioned to the interest of the sum loaned, being obliged to apply the excess to the exclusive payment of the principal of the debt; by the sale the vendor is always exposed to the loss of the property sold by reason of the inability in which he may find himself of repaying it within the contract or legal term, as well as to the danger that the purchaser may by alienation transfer it into the hands of a third party from whom neither the one nor the other could reclaim it, and by *anticresis* the debtor always preserves the right to recover his property by paying what may be wanted to cover the debt since the creditor can never sell it, not even under the same form in which he takes it and he can much less acquire title to it by prescription, only possessing it, as he does, conditionally.”<sup>a</sup>

Neither of the characteristics here pointed out by Escriche as belonging to a contract of anticresis are to be found in the Wheel-

<sup>a</sup> I Appendix, p. 366.

wright contract. He says in the first place that "the creditor cannot receive any of the proceeds but what are apportioned to the interest of the sum loaned, being obliged to apply the excess to the exclusive payment of the principal of the debt."

The contract in this case contains no provision requiring any such application of the funds to the payment of this debt. Under this contract the concessionaries could apply to their debt only Bolivia's portion of the net proceeds and they could apply this indiscriminately to principal or interest.

In the second place Escriche says:

"By anticresis the debtor always reserves the right to recover his property by paying what may be wanted to cover the debt."<sup>a</sup>

The Wheelwright contract is wholly lacking in this element of anticresis. The leasehold term ran in this case twenty-five years. It had this duration irrespective of whether or not the debt was paid. Indeed, in its terms it expressly recognized that the debt might be paid before the expiration of the term and contained specific provisions as to the distribution of the proceeds in such an event. The existence of the debt was not essential to the continuance of this contract and the Government of Bolivia could not by satisfying the debt due under this contract have terminated the leasehold term. The debt and the duration of the concession were wholly, distinctly, and absolutely independent each of the other.

Again, Escriche further discusses the character of anticresis in the following language:

"However it may be, the question of *anticresis* depends upon the question of interest on money and so long as it is lawful to charge interest for money which has been loaned it will be equally so to enter into contracts of *anticresis* which reduce themselves to receiving said interest in the form of proceeds.

"In accordance with what has been said, *anticresis* is contracted when he who has taken money at interest delivers to the creditor real property in order that he may receive its proceeds by way of interests: '*Contrahitur antichresis*,' says Argetreo, '*cum dibitar accepta sub usures pecunia, fundum creditori fruendum dat pro interusurio pecuniae*.' (*Anticresis* is contracted, says Argentreo, when the debtor, money having been accepted at interest, gives to the creditor a property which must be enjoyed in place of the interest on the money accruing meanwhile.)

"The word '*Anticresis*' is Greek and it signifies the enjoyment of contrary use and its application is not inopportune to the contract whereby the creditor enjoys the property of the debtor while the debtor enjoys the money of the creditor.

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<sup>a</sup> I Appendix, p. 367.

"*Anticresis* is in accordance with the principles of compensatory justice; since it would not be just that the creditor should be deprived of the enjoyment of his money and the proceeds of the heritage and that the debtor enjoy both these things.

"*Anticresis* is distinguished from pledge and mortgage: from pledge by the reasons which we have already pointed out; from the mortgage because in this latter the debtor retains possession of the thing mortgaged while on the other hand, prescinding for the moment from other differences, the thing given *anticresis* is delivered to the creditor.

"Not only the debtor, but also the third person, if any, can deliver a thing in *anticresis*.

"Real estate may be given in *anticresis* which produces fruits be they natural, such as those of a vineyard or an olive orchard, or be they artificial, such as those of a house.

"The creditor does not acquire by this contract anything except the right to receive the proceeds of the estate which is delivered to him with the obligation of crediting them annually on the interest that may be due him and afterwards on the principal of his debt.

"If the fruits of an estate are about equal in an ordinary year to a legal interest on the debt, that is, to the interests which do not exceed the rate fixed by law, it may be stipulated that the entirety of the proceeds shall equal the total of the interests: but if the value of the proceeds is greater than the amount of the legal interest the excess must be applied to the exclusive payment of the principal of the debt without the possibility of making increment that will open the door to usury, the creditor, therefore, being obliged to preserve in this case a quantity of the proceeds which he may collect in order to present it to the debtor: '*Non debet creditor,*' says Argentreo, '*ampliare fructus precipere quam quanti conveniat cum legitimis pecunie usuris, alioquin usurae valium contractum corrumpet.*' (The creditor must not, says Argentreo, receive greater fruits than what would equal the legitimate interest of the money, otherwise the vice of usury would vitiate the contract.)"<sup>a</sup>

The contract wholly fails to satisfy the repeated elements of the contract of *anticresis* as here set forth, namely:

"*Anticresis* is contracted when he who has taken money at interest delivers to the creditor real property in order that he may receive its proceeds by way of interest;" \* \* \* "it signifies the enjoyment of contrary use \* \* \* whereby the creditor enjoys the property of the debtor while the debtor enjoys the money of the creditor;" \* \* \* "it would not be just that the creditor should be deprived of the enjoyment of his money and the proceeds of the heritage and that the debtor enjoy both these things."<sup>b</sup>

The Wheelwright contract is not a contract in which the proceeds of the mines held under it are to be appropriated in lieu of interest, since such debt expressly draws interest.

<sup>a</sup> I Appendix, p. 368.

<sup>b</sup> I Appendix, p. 368.

Perhaps the basic principle of the whole contract of anticresis is best expressed by Escriche when he says:

"The creditor does not acquire by this contract anything except the right to receive the proceeds of the estate which is delivered to him with the obligation of crediting them annually on the interest that may be due him and afterwards on the principal of his debt."<sup>a</sup>

It is not perceived that it is necessary to do more on this point than again to state how fully and fundamentally this contract fails to answer to this principle for the reason that the contract would exist independently of the debt.

Finally, Escriche enlarges upon these principles and upon the effects which follow from them, in the following language:

"The debtor cannot ask the return of the property given in *anticresis* prior to the entire satisfaction of the debt, interest and expenses, if there be any, as is provided, except for the interest, in the case of a pledge by law 21, title 13, part 5; and if the creditor should hold against the same debtor another credit contracted after the first, provided it be in writing, and the term of its payment is expired, he may retain the thing given in *anticresis* until the satisfaction of both debts, although the proceeds of the estate were not pledged to the payment of the second: but in this hypothesis *anticresis* would have no effect regarding the second debt against a third party to whom the debtor should sell or pledge the estate since he would have the right to reclaim it by paying the first debt as law 22, title 13, part 5, provides concerning a pledge.

"The creditor who may find the fulfillment of the obligations which he has to assume and which we have pointed out too onerous may, when he sees fit, abandon to the debtor the thing which he has received from him in *anticresis*, renouncing this guarantee, provided that he has not agreed with the debtor to care for the estate until the repayment of the debt, since everyone is free to forego what has been done in his favor unless there be an agreement to the contrary.

"Although the debt is not paid within the time agreed the creditor cannot dispose of the thing received in *anticresis*, since he only holds it on deposit; he cannot appropriate it to himself as purchased because it has been loaned to him, even though it has thus been agreed with the debtor, since such an agreement is void even with respect to a pledge, according to law 41, title 5 and law 12, title 13, part 5; nor can he have it sold at public auction as a pledge, because he does not hold it in any other right than that of receiver of the proceeds, unless to the contract of *anticresis* that of a pledge or mortgage had been joined or unless the debtor had expressly authorized him to do this; but if it had been stipulated that if the debt was not paid within the time limit the estate should be understood to have been sold to the creditor for its just value in accordance with the appraisement of experts, this agreement would be valid and would have to be carried out as said law 12, title 13, part 5 provides in the case of a pledge."<sup>b</sup>

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<sup>a</sup> I. Appendix, p. 368.

<sup>b</sup> I. Appendix, p. 370.

But not only is this contract not in fact or in law a contract of anticresis and not only was it never intended by those who negotiated and concluded it to enter into such a contract, but the following facts conclusively demonstrate that it was beyond the power of the Bolivian Executive, acting under the decree of 1853 and the laws passed for the purpose of enabling the Executive to put that decree into effect, to negotiate an anticretal contract with reference to these estacas mines.

The decree of 1852 provided in Article 3 as follows:

"In consideration of the advantages which the sale or the leasing of these estacas will produce in favor of the ends of public instruction the Government shall *sell or lease* them in accordance with the forms established by the laws." <sup>a</sup>

The National Constituent Assembly in its law passed October 19, 1871, authorized the Executive—

*"to celebrate contracts of renting or working in partnership all the mines (estacas minas) belonging to the State in the mineral districts of the Republic."* <sup>b</sup>

It will be observed that this law authorizes "*renting or working in partnership*" and does not authorize the making of a contract of anticresis.

The executive decree of November 2, 1871, based upon the law of October 19, 1871, just quoted, provided as follows:

"Article 1. *That a tender is invited for the working of the estacas mines of the state in partnership, the state being considered as an industrial partner.*

\* \* \* \* \*

"Article 3. *That the Government as an industrial partner does not bind itself to reimburse losses to the partners who furnish the capital.*

\* \* \* \* \*

"Article 7. The company shall be organized in accordance with the Code of Mines, it being understood that the State, because of the part it takes as a partner, does not waive the privileges which it enjoys in mining matters." <sup>c</sup>

It will be observed that there is nothing in this decree authorizing the making of an anticretal contract regarding the government mines of the Littoral.

Moreover, on September 19, 1872, a further decree was issued by the Executive which provided:

"Article 1. *A new tender is asked for the working of the Estaca mines of silver of the State of Littoral in association with it in the sense that the State shall be considered as an industrial partner.*

<sup>a</sup> II Appendix, p. 271.

<sup>b</sup> II Appendix, p. 273.

<sup>c</sup> I Appendix, p. 298.



"Article 2. The proposals shall be presented in a package sealed until the first day of April, 1873, on which day, at 12 o'clock, they shall be opened at a Cabinet meeting and in the presence of the Government Attorney, and they shall be classified so that the most advantageous one shall be accepted.

"Article 3. *The Government, as an industrial partner, shall not be obliged to reimburse losses to the partners who furnish capital.*

"Article 4. *The duration of the association shall be fixed in the contract, and during the time that may be stipulated the State shall not be able to sell the Estacas involved.*

"Article 5. *The partners furnishing capital shall make in their proposals an offer in advance on the net proceeds which the State is to receive. The sum advanced shall be considered as a deposit being the guarantee of the immediate commencement of the work and for every charge that might result from the fault of the managers; and its payment shall be made by an amortization of 6 per cent., to be deducted from the net proceeds.*

"Article 7. *The partnership shall be organized in accordance with the provisions of the national laws, and the working shall be effected in conformity with the mining code, it being understood that the State, by reason of its participation, does not renounce the privilege which it enjoys in mining matters.*

"Article 8. The Decree of November 22, 1871 is repealed.

"Article 9. *The Government recommends to the Prefects and Sub-Prefects that they take the most efficacious measures to safeguard the Estacas of the nation, avoiding usurpation and trespass on the part of the miners.*

"Article 10. For the working of the Estacas in the mineral districts of the interior departments the Government shall again call for tenders." <sup>a</sup>

It was under these decrees and laws, which authorized the Executive merely to lease or sell these estacas mines and not to pledge them under an antiretal contract, that the Wheelwright contract of 1876 between Wheelwright and the Government of Bolivia was negotiated and concluded.

Moreover, it is entirely clear that both Wheelwright and the Government understood that this was a partnership arrangement. In the petition addressed to the Minister of Finance and Industry on August 19, 1878 by José Santos Monroy, for and in behalf of Wheelwright, Monroy makes the following statements:

*"By the aforesaid exploitation contract, there was formed between the Supreme Government and my constituent, a veritable mineralogical society, the management of which was confided to the latter."* <sup>b</sup>

On February 5, 1879, in an executive decree addressed to the Fiscal of the Coast District, the Bolivian Executive made the following statements:

"Repeated demands having been made to the Government on the part of Mr. Wheelwright, *who in association with the State, is*

<sup>a</sup> I Appendix, p. 299.

<sup>b</sup> II Appendix, p. 177.

working the fiscal mining setts (*estacas minas fiscales*) of your district, in order to render effective *his action as administrator of the Society*, which he is in virtue of his contract, the President of the Republic charges me to request you to forward to the Fiscal Ministry the following instructions:

“First.—That the Fiscal of the District of Caracoles, who, according to law, represents the rights of the State, should put in force the legal measures which the contractor may deduce, seeing that he is not guided by private interests, but as a *partner with the Government*, in place of putting obstacles in the way, as would seem to be the case from the evidence which accompanies one of his claims.”<sup>a</sup>

It will be observed that in this decree the Executive distinctly speaks of the relationship between the Government and Wheelwright as “in association with the State,” that Wheelwright is acting as “administrator of the society,” and that he is under this contract “a partner with the Government.” It is confidently submitted that these expressions entirely preclude the idea that the relationship between Wheelwright and the Bolivian Government in this contract was different or other than the relationship which the Executive was authorized to conclude under the various laws and decrees above mentioned.

It would, therefore, seem sufficiently established by the above discussions and the documents therein quoted, that the concessionary grant to Wheelwright of December 26, 1876, is not in fact or in law, and was not intended to be, a contract of anticresis; that it did create a vested right, title, and interest in the concessionaries to the government mines of the Bolivian Littoral; that this interest was a concessionary grant in the nature of a leasehold estate running for a period of twenty-five years, which concessionary grant carried with it certain rights, privileges, and immunities heretofore discussed; that the concessionary grant was separate and distinct from the debt or the liquidation thereof; that therefore the concessionaries had a right to the enjoyment of these rights, titles, and interests for the full concessionary term without let or hindrance or molestation; and that the Government of Chile, in so far as that Government derogated from, destroyed, or interfered with, these rights, titles and interests, or any of them, became liable to answer in damages for all such injury as their action may be found to have inflicted.

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<sup>a</sup> II Appendix, p. 148.

### *Sub-Point C.*

Under the concessionary grant to Wheelwright of December, 1876, Wheelwright enjoyed, in the government estacas, for purposes of occupation, possession, and exploitation, the rights, titles, and interests which were possessed by the State.

### *Prefatory Summary.*

The various decrees issued by the Government of Bolivia conclusively demonstrate that under his contract of 1876 Wheelwright enjoyed for the purposes of occupation, possession, and exploitation the rights, titles, and interests which were possessed by the State. This was clearly apparent from the texts hereinafter given of the governmental decrees of 25th July, 1878, August 9, 1878, August 21, 1878, and February 5, 1879.

### *Discussion.*

It is entirely clear that under this contract and for the term thereof, the concessionaries possessed in the government estacas in the Bolivian Littoral all of the rights belonging to the Government of Bolivia. This fact is recognized and is expressly stated over and over again by the Executive of Bolivia in the various orders and decrees issued by that Government with reference to the operation and enforcement of the provisions of the Wheelwright contract.

In the Government decree of the 25th of July, 1878, it was ordered:

"Let this representation be forwarded to the Prefect of the Department of Cobija, in order that he may cooperate effectively with the Fiscal and other public functionaries of Caracoles, so that in the sphere of their attributes, they may render the most active cooperation to Mr. John Wheelwright, *who represents the rights of the State*, with the object of putting him in possession of the mining setts (Estacas Minas) of the State, in fulfillment of the agreement of the 24th December 1876."<sup>a</sup>

On August 9, the Prefecture of the Department of Cobija was directed as follows:

"In conformity with the reasons given by the Fiscal of the Department, and the claim made by the agent of Mr. John Wheel-

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<sup>a</sup> II Appendix, p. 145.

wright being just and legal, it is ordered: That in all measurements and surveys of silver mines made in future by the Territorial Deputation, Mr. Wheelwright or his representative be notified, *in protection of the rights of the State, in order that he may form an opinion and take the necessary steps for the due fulfillment of the settlement of the 24th December, 1876.* Likewise, that to all titles or minutes of possession, the clause protecting the rights of the State be added.”<sup>a</sup>

On August 21, 1878, there was issued from the Ministry of Finance and Industry, the following order signed by President Daza and Minister D. Medina:

“In virtue of the reasons on which this petition is founded, and considering that Mr. Wheelwright took over the Fiscal Mining Setts (*Estacas Minas Fiscales*), under the contracts of the Settlement of the 24th December, 1876, as the representative of the State, it is hereby declared that as such he should enjoy the same privileges as the State in the judicial measures which he may initiate and sustain in order to enter into and maintain possession of the said Fiscal Mining Setts.”<sup>b</sup>

The last order issued by the President and his Minister upon this matter prior to the occupation of the Littoral by the Chilean forces in 1879, the order being dated February 5, 1879, reads as follows:

“MINISTRY OF JUSTICE,  
“PUBLIC INSTRUCTION AND WORSHIP,  
“La Paz, 5th February, 1879.

“To the Fiscal of the Coast District.

“SIR: Repeated demands having been made to the Government on the part of Mr. Wheelwright, who, in association with the State, is working the Fiscal Mining Setts (*Estacas Minas Fiscales*) of your district, in order to render effective his action as administrator of the Society, which he is in virtue of his contract, the President of the Republic charges me to request you to forward to the Fiscal Ministry the following instructions:

“First.—That the Fiscal of the District of Caracoles, who, according to law, represents the rights of the State, should put in force the legal measures which the contractor may deduce, *seeing that he is not guided by private interests, but as a partner with the Government*, in place of putting obstacles in the way, as would seem to be the case from the evidence which accompanies one of his claims.

“Second.—That as, according to Article 168, Clause 2, of the Mining Code, the neighbor can have free entrance to a mine when he presumes or fears some prejudice, the contractor, Mr. Wheelwright, cannot be refused the right of investigating personally, or by means of his agent, the encroachment of the neighbor on the bounds of the Fiscal Mine, in order to formulate the corresponding demand before the competent authority in the event of his fears being realized; while, on the other hand, this right of procedure, merely administrative cannot be restrained by any opposition whatsoever.

<sup>a</sup> II Appendix, p. 146.

<sup>b</sup> II Appendix, p. 147.

"Third.—In the event of any well-founded dispute arising, information of the matter shall be passed to the competent judge in the form prescribed, amongst other depositions, by the law of 10th November, 1873.

"As will be observed, the Government, in the foregoing instructions, does not make any new resolution, but only calls to remembrance, the legal dispositions mentioned, in order that they may have the most faithful and strict fulfilment.

"May God be with you.

"(Signed.)

DAZA.

"(Signed.)

SERPIO REYES ORTIZ.

"Given at the verbal request of the party interested, Mr. José Santos Monroi, as representative of Mr. Wheelwright.

"(Signed.)

MELQUIADES LOAIZA,

*"Chief of the Section of Justice."*<sup>a</sup>

"[SEAL.]"

That this right and interest thus defined by the various decrees and orders of the Bolivian Executive were real and vested rights, titles, and interests; that they were fully and absolutely conveyed by the Government of Bolivia to the concessionaries; that the concessionaries were entitled to enjoy these rights, titles, and interests which had been conferred upon them by the contract up to and including the last moment of the period for which their concession ran; and that this interest thus granted under Bolivian law could not be adversely affected by even such a legislative act as the repeal of the decree of 1852 (which provided for the segregation of the government estacas), is made quite clear by Dr. Melquiades Loaiza, who, in a semi-official treatise <sup>(b)</sup> entitled "*La Nueva Legislacion de Minas de la Republica de Bolivia*," (published in 1885), and having quoted Article 37 of the Mining Code of 1880, which provided that "the Supreme Decree of July 23, 1852, relating to the Estacas Mines of Public Instruccion, is hereby repealed," made upon this point the following statement:

"5. Notwithstanding what has been said in the foregoing number, the estaca mines situated in the Department of the Littoral

<sup>a</sup> II Appendix, p. 148.

<sup>(b)</sup> "INTRODUCTORY DECREE BY THE GOVERNMENT OF BOLIVIA.

"MINISTRY OF JUSTICE, EDUCATION AND PUBLIC INSTRUCTION,

*"La Paz, June 23, 1883.*

"The Government recognizes the patriotic labor and the importance of the work which, in accordance with his former petition, Dr. Melquiades Loaiza offers to complete, and grants him permission to reprint the new Mining Code and the coordinate provisions, together with the explanatory part which composes the notes, concordances, and comments which he points out, all of which is the private property of the author. The Government Attorney of the District shall take care that the integrity of the official text shall not be altered, following the decrees of October 23, 1871, and February 17, of the present year. Let it be registered and returned after having been properly transcribed to the Government Attorney of this District.

"(Signed.)

CAMPERO.

"(Signed.)

PEDRO H. VARGAS."

are not included in the derogation of Article 37 of this law; because there exists rights acquired by Alsop and Company of Valparaiso, whose credits against the Treasury must be extinguished by their returns, as is stated by the Minister of Hacienda and Industry in his Memorial of 1883."

It will be thus observed that in the decrees of July 25, 1878, August 9, 1878, and August 21, 1887, Wheelwright is spoken of as representing the rights of the State, or as enjoying the rights of the State, or as the representative of the State; while in the decree of February 5, 1879, the relationship between Wheelwright and the State was said to be that of a partnership, Wheelwright acting as the "administrator of the Society." Under these circumstances, it cannot be doubted that the rights which the State held in these government estacas were, during the life of the lease, possessed by Wheelwright.

*Sub-Point D.*

Among the rights, titles, and interests in said government estacas, which by virtue of the relationship and status Wheelwright enjoyed under this contract, with reference to the government estacas therein granted, were (1) the right to hold said estacas free from the penalty of denouncement for abandonment, and (2) the resulting freedom from the necessity of taking, or remaining in, the physical possession of the estacas chosen and designated by him under his contract.

*Prefatory Summary.*

It seems wholly clear that among the rights, titles, and interests possessed by Wheelwright in virtue of his standing in the place of the State with reference to the government astacas was the right to hold the government mines free from the penalty of denouncement for abandonment. This appears to be clearly assumed by the decree of March 1, 1860, and was specifically stated in the resolution of the 12th of October, 1871, which latter decree was recognized in connection with the Gama contract of 1873 in an opinion by the Prefect of the Department of Lamar under date of November 14, 1873, this opinion being ratified and approved by the Ministry of the Treasury on December 20 of the same year. This same principle was recognized in the decree of December 12, 1878, and also in the semi-official work of Dr. Melquiades Loaiza, "Nueva Legislacion de Minas." Moreover, the Supreme Court of Bolivia on October 28, 1872, rendered a decree which distinctly recognized the non-denounceability of the government estacas. And this same position has been taken by the courts of Chile in the case of the *Justicia*.

Moreover, it should be observed that under the numerous decrees and orders issued by the Executive at various times for the enforcement of the rights of the Government to the government estacas it was distinctly recognized that the Government was entitled to the possession of the government estacas irre-

spective of the actual fact of possession at the time the various decrees were issued, that is, whether the Government had at the time or ever had had possession or whether the possession was actually exercised by third parties. In either case, the decrees go to show that the Government was entitled to possession immediately upon request. This principle was distinctly recognized in those provisions which required that parties should surrender possession to the State and to the State contractor. Of such a character are the decrees of March 1, 1860, October 22, 1873, December 12, 1873, and December 20, 1873.

Finally, this principle was distinctly recognized in the various decrees issued by the National Executive for the enforcement of the Wheelwright contract. In these decrees it was reiterated over and over again that Wheelwright was entitled to the possession of all of the government mines in the littoral irrespective of the fact that they might be then in the actual possession of third parties, and in at least one decree it was stated that he was entitled to the possession of the government mines as against those in possession even though such adverse and trespassing possessors "should call to their aid the appeal of good faith."

### *Discussion.*

Among the rights which attached to, and therefore which accrued in favor of, the concessionaires under this contract by reason of their standing in the place of the State, was the right to hold the estacas mines under this contract free from the susceptibility of denouncement under Bolivian law. This fact is conclusively proved by the following executive decrees, decisions of the courts, and opinions of authoritative writers:

As early as March 1, 1860, a decree was issued by the National Executive which directed the various officers concerned to take possession of the government estacas irrespective of whether or not they were occupied by other parties. This decree reads as follows:

#### "TREASURY OF INSTRUCTION.

"*Circular of March 1.*—Let the decree of July 23, 1852, be made effective.

"The Republic of Bolivia.—Office of the Department of Public Instruction and Education.—*In La Paz, March 1, 1860.*—

"To the Honorable the Political Chief of \* \* \* "Mr. Political Chief:

"The Supreme Decree of July 23, 1852, applies to the funds of Public Instruction the fourth estaca of the mines which may be dis-



covered, and since from information which this Department possesses, it does not appear that said disposition has been complied with, His Excellency the President of the Republic, who incessantly strives to make effective everything which may contribute to the progress of Education, orders that from this date said disposition be put into effect for the purpose of which he relies upon the activity and patriotism of the officials to whom its fulfillment pertains.

*"With regard to the mines which may have been discovered from the date of such decree until the present, you will order that the fiscal agents shall receive the estacas belonging to Public Instruction, which by the negligence of the former administrations, have not been added to the wealth of that Section.*

"I communicate this to Your Honor by order of His Excellency, for its exact fulfillment.—God guard Your Honor.—Evaristo Valle.—A true copy.—The Chief of the Division, Nestor Galindo." <sup>a</sup>

Under date of October 12, 1871, the following resolution was entered regarding this matter:

"RESOLUTION OF THE 12TH OCTOBER, 1871.

"Department of Mining. The Estacas of the State are imprescriptible.

"MINISTRY OF FINANCE AND INDUSTRY,  
"Sucre, 12th October, 1871.

"CIRCULAR.

*"To His Honor the Prefect of the Department of—*

"SIR: In the inquiry which the Sub-Prefect of the Province of Chayanta directed to the Government respecting the abandonment of the mines (Estacas Minas) which belong to Public Instruction, there has, under this date, been resolved in answer thereto, the following:

"SIR: The matters pending in the Departments of Finance and Industry having been placed for settlement in this Ministry, I have made myself acquainted with the inquiry which you conveyed in your note of the 9th July last respecting the denouncement which Dr. Jose Lino Mendoza made, on account of abandonment, of the mines of Public Instruction in the lodes Embudo and Melgarejo of the hill of Anconaza, mineral district of Ayllagas.

*"Most singular and even absurd has been the denouncement of Mr. Lino Mendoza, and stranger still is it that the public minister of that province should have been of opinion that the mines denounced had become liable to abandonment, as if the possessions of the State could be prescribed.*

"This abandonment does not, nor can it hold good with respect to the mines of Beneficence or of Instruction, *which* (as the Attorney General of the Republic pronounces) *are national possessions, and are amply protected by the decree of their adjudication, which has in*

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<sup>a</sup> I Appendix, p. 296.

view the creation of funds to meet one of the most vital necessities of the public administration.

"Consequently, Mr. Sub-Prefect, there is no abandonment in the national possessions, which the mines of the State are and nothing else.

"Which, by order of his Excellency, I communicate to your Worship, in order that you may cause it to be published in the cantons and mineral districts of that province.

"May God be with Your Worship.

"Rubric of His Excellency.

"CASIMIRO CORRAL.

"Which I transcribe to your Honor for your needful information and in order that you may transmit it to the authorities within your jurisdiction, ordering its publication by the official periodical of that city, so that, becoming known, it may serve as a general rule.

"May God be with your Honor.

"(Signed.)

CASIMIRO CORRAL." <sup>a</sup>

When in 1873 Señor Pedro Lopez Gama made with the Government of Bolivia his contract for the operation of the government mines in the Bolivian Littoral he petitioned the Prefect of Cobija for a categorical declaration concerning the estacas which belonged to the Treasury. The Prefect consulted the Government on the subject and the Government replied to him as follows:

"The location of each one of the estacas of the Treasury in the various registries of veins of silver, which have taken place in that Department, is found to be determined with entire precision by the law. *The Supreme Decree of July 23, 1852, affirmed by legislative acts as a law of the State, designates for the Treasury of Public Instruction the estaca next following those of the discoverer or denouncer in every vein of silver of other metal.* Starting from this precedent and bearing in mind the provisions of the Mining Code pertaining to this subject, the designation of the Treasury claims of which Sr. Pedro Lopez Gama should take possession ought to give rise to no doubt. *By Article 16 of said Code, which also refers to Article 19, the discoverers, through prospecting veins in new workings, are entitled to three estacas and of them the fourth belongs to the State. By Article 20, the discoverers of a vein in a mining district known and worked in other parts, are only entitled to two estacas. Of these the third belongs to the State.* The exact applications of said dispositions in the mining districts of the Littoral overcomes any objection or difficulty that individual interest may interpose.

"*If any of the operators of that district should believe they have a right to the third estacas and invoke the decree of September 29, 1871, which by mistake stated that the fourth estaca always belonged to the Treasury, it is very strange that they forget the tenor of the explanatory circular order of October 9, which, correcting the inexact expression of the decree, declares that the fourth and the third are respectively in the very terms set out in the Code, those which belong to the State.*" <sup>b</sup>

<sup>a</sup> II Appendix, p. 272.

<sup>b</sup> I Appendix, p. 317.

Upon receiving this reply the Prefect rendered the following opinion upon the point raised by Gama:

“PREFECTURE OF THE DEPARTMENT,

“*Lamar, November 14, 1873.*

“Considering:

“1. That the discoveries of veins of silver made by Señor Diaz Gana through diverse prospectors took place in an unknown portion of the desert of Atacama to which the discoverer himself later gave the name of Caracoles;

“2. That in accordance with paragraph 1, article 16, corroborated by article 19 of the mining code, there belong to every discoverer in a virgin workings three Estacas;

“3. That article 20 provides only as an exception the fact that the discovery may have taken place in a known mineral district, known or worked in other portions; It is declared in conformity with the Executive Decree of October 23, 1871, and articles 16, 19 and 20 of the code of mines that the contractor Don Pedro Lopez Gama had to take possession of all the veins of estaca discovered by Don Jose Diaz Gana and prospectors which was discovered before work of any sort had been begun in the mineral district of Caracoles and of the third estacas on the other veins except in the case provided for by article 199 of said code. Let it be registered and notification thereof be given to the said contractor, Don Pedro Lopez Gama, and that it be brought to the attention of the Supreme Government.

“FERNANDEZ COSTAS.”<sup>a</sup>

This opinion was in turn passed upon by the Ministry of the Treasury and Industry which, under date of December 20, 1873, pronounced the following decision:

“*Ministry of the Treasury and Industry. Nuccho, December 20, 1873.*

“Having examined at a Cabinet meeting the communication addressed by the Prefecture of Cobija, the statement of the Attorney General and the opinion of the Counsel of State, and considering that, in accordance with the proposal accepted on the first of April of the current year, Señor Pedro Lopez Gama ought to take charge of the workings and exploitation in partnership of the Estaca mines belonging to the State on veins discovered in the Littoral, and of those which hereafter may be discovered; that from the certified copies of the grants attached taken from the Book of Public Records in the Prefecture of Cobija it appears that there have been successively adjudicated to the Department of Instruction Estacas determined with entire clearness in each one of the registrations; that, therefore, and such acts constituting the titles of property of the State which have not been annulled, cancelled or modified by any later disposition, the Estacas in them designated are those which the Government let in partnership as belonging to the State at the time of making the contract, and the

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<sup>a</sup> I Appendix, p. 319.

same of which Lopez Gama ought to take possession; the resolution issued in this proceeding by the Prefecture of Cobija on November 14th last is approved.

"Let it be registered and returned.

"BALLIVIAN.

"MARIANO BAPTISTA.

"DANIEL CALVO.

"MARIANO BALLIVIAN.

"PANTALEON DALENCE."<sup>a</sup>

The same principle was announced, indeed was the basis of the Decree of the Minister of Finance and Industry, dated December 12, 1878, which reads as follows:

"MINISTRY OF FINANCE AND INDUSTRY,

"La Paz, 12th December, 1878.

"To the Prefect of the Department of Cobija.

SIR: The President of the Republic has resolved: That, as soon as in the Department under your jurisdiction any discoveries of minerals have been made, and the legal Setts (estacas) have been adjudicated to the discoverers in conformity with the Mining Code, the respective authorities, shall, in fulfilment of the Supreme Decree of the 23d July, 1852, and other dispositions relative thereto, without waiting for any petition or other representation, proceed to the measurement, placing of boundaries, and adjudication to the State of the Fiscal Mining Sett (Estaca Mina Fiscal), under their immediate responsibility, *the possession taken by any interested parties whatsoever, of such Mining Setts being null and void, even when they call to their aid the plea of good faith.*

"The authority charged with the measuring, placing of boundaries and adjudication to the State of the Fiscal Mining Sett, shall cause Mr. Wheelwright to be notified, in order that he, as representative of the State, may intervene in the said operations, in compliance with the Contracts of Settlement of the 23d and 24th December, 1876.

"May God be with you. -

"(Signed.)

H. DAZA.

"(Signed.)

SERAPIO REYES ORTIZ."<sup>b</sup>

Dr. Melquíades Loaiza, in his semi-official work, "Nueva Legislacion de Minas," makes the following comments upon this point:

"(C) Are the estacas mines capable of readjustment because of desertion? We answer in the negative, relying upon the conclusion of the text writers who have treated of this subject of which we shall cite Escalona, who has expressed his opinions in the following terms: '*The mines of His Majesty (of the State) cannot be asked for on account of abandonment at any time when they are not being worked because the right of abandonment only prevails against an individual and not against the legislator who is always exempt; besides, it is not just that the fault into which the royal ministers may have fallen in this regard should redound to the injury of His Majesty and thereby his condition be made worse.*' "

<sup>a</sup> I Appendix, p. 319.

<sup>b</sup> II Appendix, p. 148.

But it is unnecessary in this matter to depend solely upon executive decrees in order to establish the imprescriptibility of the government estacas, since the Supreme Court of Bolivia has itself recognized this doctrine in the case brought by one José Santos Munos Chavez to determine the constitutionality of the decree of July 23, 1852. The court, in rendering its decision in this case (already quoted above), used the following language, it appearing from the narration of facts that an attempt was being made to secure possession of a mine for abandonment:

"The Supreme Court declares that the estaca mine prayed for by Don José Santos Munoz Chavez upon the vein of Cibelos, cut by the tunnel of San Bartolomé in the mining district of Aullagas, cannot be granted because it is a property of the State, recognized by the aforesaid laws. Having been registered, let it be filed.—Sucre, October 28, 1872."<sup>a</sup>

Finally, the matter would appear to be definitely determined, so far as the purposes of the present controversy is concerned, by the decision of the court of first instance at Antofagasta in the case of the *Justicia*, which recognized the non-denounceability of these mines under Bolivian law by citing and approving the decree of October 12, 1871, (quoted above) which stipulated the imprescriptibility of the government mines:

"5. That, although in the pleadings there is no evidence that the said decree would be submitted immediately to the approval of the Legislative Chambers, as is ordered therein, there have been published, after it, various dispositions embodied in laws, decrees, orders and dispositions, which recognize and sanction the legal existence of the estacas destined to public instruction, and regulate their exploitation, as, amongst others are the circular of the 21st May, 1860, which ordered that the decree of the 23d July should be made effective, the decree of the 29th September and 8th October, 1871, respecting the estacas belonging to the State, *the law of the 12th of the same month and year declaring the estacas of instruction to be imprescriptible*, the law of the 19th October, of the said year, which empowers the executive to celebrate respecting same contracts of letting or for working them in partnership, the law of the 15th November, 1873, which directs that the Government may proceed to take possession of them, and many other dispositions which it would be tedious to enumerate."<sup>b</sup>

It is submitted that these various decrees and decisions of the Supreme Court of Bolivia as well as of the court of first instance in Chile established the principle that under Bolivian law the government mines were imprescriptible, at least as against the State, and in view of the facts established under sub-point C,

<sup>a</sup> I Appendix, p. 352.

<sup>b</sup> II Appendix, p. 112.

*supra*, that under the Wheelwright contract the concessionaries stood in the place of, and enjoyed the rights belonging to, the State, it must be considered that the mines were imprescriptible as against the concessionaries under this contract.

If the government *estacas* were imprescriptible of necessity they could not be acquired by a private person because of abandonment, and if they could not be acquired for abandonment it necessarily follows that it was unnecessary for the State, or any person occupying the place of the State, to continue in possession thereof. In other words, neither the State "nor the partner of the State" needed to assume possession, nor, having assumed it, to retain possession, in order to have an indefeasible right to the possession and enjoyment of the government *estacas*. There is almost no decree or law which was ever issued for the enforcement of the decree of 1852 which does not contain one or more statements establishing this fact. For example, it was provided in the decree of March 1, 1860, (quoted above) as follows:

*"With regard to the mine which may have been discovered from the date of such decree until the present, you will order that the Fiscal Agents, shall receive the estacas belonging to the public instruction, which by the negligence of the former administration has not been added to the wealth of that section."*<sup>a</sup>

In the decree of October 12, 1871, the Minister of Finance and Industry affirms that—

*"Consequently Mr. Sub-Prefect there is no abandonment in the national possessions, which the mines of the State are, and nothing else."*<sup>b</sup>

In an opinion handed down to the Prefect of Cobija on October 22, 1873, the Government asserted:

*"The designation of the Treasury claims of which Señor Pedro Lopez Gama should take possession ought to give rise to no doubt*  
\* \* \*

*"If any of the operators of that district should believe they have a right to the third estacas and invoke the decree of September 29, 1871, which by mistake stated the fourth estaca always belonged to the Treasury, it is very strange that they forget the tenor of the explanatory circular ordered of October 9, which, correcting the inexact expression of the decree, declared that the fourth and the third are respectively, in the very terms set out in the Code, those which belong to the State."*<sup>c</sup>

In an order issued by the Prefect of Cobija in reliance upon the judgment thus given, the Prefect made the following declaration:

*"It is declared in conformity with the Executive Decree of October 23, 1871, and articles 16, 19 and 20 of the code of mines that the*

<sup>a</sup> P. 296, *supra*.

<sup>b</sup> II Appendix, p. 272.

<sup>c</sup> I Appendix, p. 317.

contractor Don Pedro Lopez Gama had to take possession of all the veins of estaca discovered by Don Jose Diaz Gana and prospectors which was discovered before work of any sort had been begun in the mineral district of Caracoles and of the third estacas on the other veins except in the case provided for by article 199 of said code. Let it be registered and notification thereof be given to the said contractor, Don Pedro Lopez Gama, and that it be brought to the attention of the Supreme Government."<sup>a</sup>

In the subsequent ratifying decree of the Ministry of the Treasury and Industry (dated Dec. 20, 1873) the Government asserts that—

"In accordance with the terms of the proposition accepted on the 1st of April of the present year, *Señor Pedro Lopez Gama should take charge of the working and exploitation in partnership, of the estaca mines belonging to the State, in veins discovered in the Littoral and of those which in the future may be discovered.*"<sup>a</sup>

It will be observed from these quotations that in every instance it was contemplated, and certainly in the last specifically provided, that the concessionaries should have the right to the possession and enjoyment of the government estacas belonging either to veins discovered in the past, or to veins to be discovered in the future, and this irrespective of the question as to whether or not they were in the possession of third persons or were still unoccupied, and that the decree of October 12, 1871, pronounced as "most singular and even absurd" the proposition that a private person could acquire a right to the government mines by settling upon or operating them. In other words, the question as to whether or not the State had been in possession of the mines becomes under these decrees entirely immaterial, since no one can merely by operating such mines acquire any title thereto.

It would appear to result from the principle laid down in these decrees that when, and so soon as, a prospector located three estacas in virgin ground, or two estacas in worked territory, there at once arose in favor of the State an adjoining estaca, the fourth or third respectively, to which the State had an indefeasible title under all the laws and regulations of the mining code. Moreover, as the decrees already quoted above and those to be quoted hereafter show, it was immaterial whether or not the actual limits of that estaca have been surveyed. The survey it would seem became necessary only when it was desired to place some one in possession of a given estaca, and only then, it would appear, in order that the grantee might be informed of the limits of his ground.

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<sup>a</sup> I Appendix, p. 319.

The decrees issued subsequently to the making of the Wheelwright contract seem sufficiently to establish this latter point.

The initial decree dated January 5, 1877, issued by the Government of Bolivia for the purpose of putting Wheelwright into possession of the government mines of the Littoral directed—

“That the Sub-Prefect and others under your (The Prefect’s) jurisdiction may within their sphere, render Mr. Wheelwright such aid that he may be put in peaceful possession of the said mining setts.”<sup>a</sup>

On the 24th of May, following, the Government issued another decree reading as follows:

“MINISTRY OF FINANCE AND INDUSTRY.

“La Paz, 24th May, 1877.

“To the Prefect of the Department of Cobija.

“SIR: Notwithstanding that orders have been given to your Prefecture to facilitate the taking possession of the Mining Setts (Estacas Minas) of the State by Mr. John Wheelwright to whom they were adjudicated, these orders are now repeated with the same object, in order that, by all the legal and judicious measures in your power, you may overcome all difficulties and remove every obstacle either personally or by means of the Sub-Prefects and other functionaries who are competent to intervene in the matter.

“The strict fulfilment of this order is expected from your zeal and patriotism.

“May God be with you.

“(Signed.)

“MANUEL I. SALVATIERRA.

“The foregoing is correct.

“(Signed.)

“MANUEL PENAFIEL.”<sup>a</sup>

On the 28th of March, following, the Prefect of the Department of Cobija was again directed to—

“Render the petitioner, Mr. Wheelwright, the cooperation he asks for the prompt and peaceful possession of the Fiscal Mining Setts (Estacas Fiscales).”<sup>b</sup>

On the 25th of July, 1878, the Government decreed that the Prefect of the Department of Cobija, should—

“Co-operate effectively with the fiscal and other public functionaries of Caracoles, so that, \* \* \* they may render the most active co-operation to Mr. John Wheelwright, who represents the rights of the State, with the object of putting him in possession of the Mining Setts (Estaca Minas) of the State, in full settlement of the agreements of the 24th December 1876.”<sup>b</sup>

Again the Prefecture of the Department of Cobija was directed, under date of August 9, 1878—

“That in all measurements and surveys of silver mines made in future by the Territorial Deputation, Mr. Wheelwright or his rep-

<sup>a</sup> II Appendix, p. 144.

<sup>b</sup> II Appendix, p. 145.



representative be notified, in protection of the rights of the State, in order that he may form an opinion and take the necessary steps for the due fulfilment of the settlement of the 24th December, 1876. Likewise, that to all titles or minutes of possession, the clause protecting the rights of the State be added.”<sup>a</sup>

On August 19, 1878, it was ordered—

“In conformity with the foregoing Superior Edict, the Actuary is hereby ordered to notify Mr. Theodore Hohmann, the representative of the Contractor of the Mines of Instruction (Estacas de Instruccion) of all the operations of measurement, possession and examination which may be performed by this Deputation.

“It is also ordered that in all the minutes of possession, a clause be inserted, expressing the inviolability of the fiscal property in the event of its being encroached upon by intruders.”<sup>a</sup>

On the same day, August 19, 1878, José Santos Monroy, as the agent of Wheelwright, addressed a petition to the Minister of Finance and Industry in the following terms:

*“To the Minister of Finance and Industry.*

*“Asks for the declaration which he states.*

“I, citizen José Santos Monroy in behalf of Mr. John Wheelwright representative of the firm of Messrs. Alsop & Co. of Valparaiso, present myself to the Supreme Government through your worthy self and say: that at the time of concluding the transaction and contract for exploitation of the estaca mines of 23d and 24th of December, 1876, the Supreme Government and my constituent were undoubtedly very far from imagining what obstacles and difficulties would be presented by private interests opposed to those of the public treasury, against the realization of that negotiation—*But unfortunately the sad conviction now exists, that day by day those difficulties and obstacles against the interests of the nation become greater, owing to the facility with which the effective possession that the state should take of the estacas belonging to it, is eluded, which object is obtained by nothing more than a simple petition in which by merely saying I am opposed to this or that thing, the matter is declared contestable, and becomes a question to be heard before the ordinary courts, to be prolonged according to the caprices of the party who has brought it about.* Nevertheless for the present it is not my purpose to seek from the Government a remedy for the inconveniences arising from the facility with which these matters are declared contestable, because with respect to this I hope an occasion will soon offer for submitting some determined and concrete act to the knowledge and consideration of the Supreme Government, and for the time being I content myself by calling your attention to the matter I am about to occupy myself with.

“By the aforesaid exploitation contract, there was formed between the Supreme Government and my constituent, a veritable mineralogical society, the management of which was confided to the latter, so that from the profits to which the former might be entitled, after deducting expenses, he should pay by amortization his credit of

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<sup>a</sup> II Appendix, p. 146.

835,000 bolivianos with interest, not compoundable, at 5 per cent per annum, outside of the excess obtainable from the customs duties. Evidently the Government could not have made a more favorable contract for the payment of its very large debt, respecting which I make no mention of the past due interest to 1876, as they are subject to other special stipulations.

"If therefore in the working of the *estaca* mines of the Coast (Litoral), my constituent has no exclusive personal interest, but on the contrary is an agent for the great profits which that working may produce for the nation, there is no reason why in the exercise of the rights belonging to him, he should not enjoy the exemptions and privileges to which the Nation is entitled under the laws in its judicial proceedings, all the more when as I have said being partners, there is no difference in rights.

*"On the other hand, according to said contracts the Government was under obligation to place my constituent in pacific possession of all the fiscal estaca mines; but the latter for the purpose of obtaining the quickest possible profits for the benefit of the enterprise, has incurred heavy expenses to obtain that possession, and this has undoubtedly stimulated some parties interested in such speculations, to multiply these contentious oppositions, in the belief that in this way the acquisition of said estaca mines will be made impossible, as it will be necessary to carry on many suits for each. Under such difficulty, I have deemed it necessary to appeal to the Supreme Government that considering the fact that my constituent is merely its representative in the working of the fiscal estaca mines, it may be pleased to declare that in all administrative or contentious questions that may arise concerning them, he shall be exempt from the payment of judicial or actuary fees of every kind and entitled to make use of the stamped paper of sixth class. It will be justice & for this &c. Par August 19th, 1878.*

"S. M. (Mr. Minister)

"(Signed.)

"JOSE SANTOS MONROY."<sup>a</sup>

On August 21 the Minister of Finance and Industry passed upon the petition in the following words:

"In virtue of the reasons on which this petition is founded, and considering that Mr. Wheelwright took over the Fiscal Mining Setts (*Estacas Minas Fiscales*), under the Contracts of the Settlement of the 24th December, 1876, as the representative of the State, it is hereby declared that as such he should enjoy the same privileges as the State in the judicial measures which he may initiate and sustain in order to enter into and maintain possession of the said Fiscal Mining Setts."<sup>b</sup>

The question was once more the subject of a direction to the Prefect of the Department of Cobija on December 12, 1878, when the Minister of Finance and Industry made the following direction:

"SIR: The President of the Republic has resolved: *That, as soon as in the Department under your jurisdiction any discoveries of minerals have been made, and the legal Setts (estacas) have been adjudicated to the discoverers in conformity with the Mining Code, the respective*

<sup>a</sup> II Appendix, p. 177.

<sup>b</sup> II Appendix, p. 147.

*authorities in the matter, as well as the fiscal authorities, shall, in fulfilment of the Supreme Decree of the 23d July, 1852, and other dispositions relative thereto, without waiting for any petition or other representation, proceed to the measurement, placing of boundaries, and adjudication to the State of the Fiscal Mining Sett (Estaca Mina Fiscal), under their immediate responsibility, the possession taken by any interested parties whatsoever, of such Mining Setts being null and void, even when they can call to their aid the plea of good faith.*

*"The authority charged with the measuring, placing of boundaries, and adjudication to the State of the Fiscal Mining Sett, shall cause Mr. Wheelwright to be notified, in order that he, as representative of the State, may intervene in the said operation, in compliance with the Contracts of Settlement of the 23d and 24th December, 1876."*<sup>a</sup>

It will be observed from these decrees, and more particularly from the one last quoted, that the right of Wheelwright to these estacas did not depend (1) upon whether either himself or the State was in possession of the mines; (2) nor upon the fact that the estaca for the State had been surveyed at the time the discoverer had taken possession of the estacas belonging to him; (3) nor upon the fact that persons were already in possession of the government estacas, since such unauthorized possessors were regarded as mere trespassers; nor (4) upon the fact that such possessors had taken possession in good faith, since even in this event, as in all the others, Wheelwright was entitled to have the mines measured and possession delivered to him.

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<sup>a</sup> II Appendix, p. 148.

### *Sub-Point E.*

The Government of Chile violated and confiscated these fundamental and all important rights, titles, and interests of Wheelwright under his contract, by applying to Wheelwright's rights, titles and interests in said Government estacas, held under and pursuant to his contract, the provisions of the Chilean law, under which law it became necessary for him to expend large sums to avoid the penalty of denouncement and by the application and enforcement of which law he was deprived (improperly and illegally) of certain rich mines to which he was entitled under his contract.

### *Prefatory Summary.*

It will appear from the discussion upon this point that notwithstanding the Government of Chile at the beginning of the war of 1879 gave solemn assurances to the various Governments represented at Santiago that it would protect the rights of aliens in the Bolivian Littoral (see its note dated March 3d, 1879) and notwithstanding that the Chilean Commander in the field asserted the same principle particularly "with respect to landed properties situated in the part to which these decrees refer" and that the National Congress ratified all that the Executive had done, the Government of Chile not only applied to the conquered territory the laws of Chile but it applied these laws where such laws worked to the detriment and even to the confiscation of private rights held by aliens in the conquered territory.

The effects of this attitude were very early felt by Wheelwright, who found numerous parties settling upon the government estacas invading them from adjacent mines, and interfering generally with his operation thereof. Upon his taking the question to the courts as he did, particularly in the case of the *Justicia* and *Amonita* (though he is said to have conducted in all some 200 litigations) there was rendered against him one decision, the *Amonita*,

holding that the government estacas were denounceable and another decision, the *Justicia*, which held that he was not entitled to the government estaca unless he had been actually in possession of the government mine at the date of the occupation of the Littoral by the Chilean Government.

Both of these decisions violated rights possessed by Wheelwright under Bolivian law and were therefore contrary to the principles of international law and to the promises which had been given by Chile at the beginning of the war.

### *Discussion.*

Under date of February 18, 1879, the Minister of Foreign Relations of Chile, addressed to each of the Ministers and Diplomatic Agents accredited to Chile a note in which he set forth the causes leading to the adoption by Chile of warlike measures against the Government of Bolivia. The opening paragraphs of this note read as follows:

"On the 12th of the present month, his Excellency the President of the Republic ordered that Chilian forces should be transported to the shores of the Desert of Atacama, in order to recover and occupy in the name of Chili the territories she used to possess there before adjusting with Bolivia the boundary treaties of 1866 and 1874.

"The treaty of 1866 was annulled and disappeared on the celebration of that which bears the date of the sixth of August 1874, and this latter has just been abrogated by deliberate and persistent acts of the Government of Bolivia, acts which import not only the complete disregard of the obligations imposed upon her by that solemn compact but likewise an insult to the good faith and conciliatory spirit of Chili to which her national honor could not submit.

"Having exhausted all the conciliatory expedients which her earnest desire for the tranquillity of South American caused Chili to constantly employ, all the appeals that were directed to her for the fulfilment of obligations legally stipulated in the treaty of 1874 being scorned and disdained by Bolivia, *there remained no other recourse for Chili but to again plant her flag in the territories of which she had been owner and to return with it to numerous Chilian and foreign population and to their industrial establishments there established, that tranquillity, that confidence and that welfare of which they had been deprived by the Bolivian administration.*"<sup>a</sup>

Among the final paragraphs of this note there is to be found the following statements:

"Fifty hours later, the Chilian law ruled in that region placing under its protection the interests of Chilians and foreigners, without the shedding of a single drop of blood and amidst the patriotic enthusiasm of a reunited people."<sup>b</sup>

<sup>a</sup> I Appendix, p. 263.

<sup>b</sup> I Appendix, p. 294.

This note was transmitted to the "Honorable Ministers and Diplomatic Agents accredited to Chili" in a circular note which was dated March 3, 1879, and which reads in full as follows:

"SIR: I have the honor of enclosing to your Excellency a statement of the motives which justify the recovery effected by Chili of the territory she used to possess in the Desert of Atacama between parallels 23 and 24 South Latitude.

"I entertain the confidence that the perusal of this plain narrative will produce in the mind of your Excellency the conviction that Chili in her relations with Bolivia, did not abandon the policy of moderation and considerate conduct, which she so strongly admires, until she had exhausted all the resources in her power and imperiled the dignity of the nation and the valuable interests of her citizens residing in that territory.

"The high and legitimate interest to which the Chilean Government aspires, that its international policy may be duly appreciated by those Governments whose friendship is to it an honor, and whose esteem it endeavors by unceasing efforts to deserve, has induced me to put in writing the exposition I now have the honor of placing in your Excellency's hands, begging that you will be pleased to bring the same to the knowledge of your enlightened Government.

*"I need not assure your Excellency, that your fellow countrymen will find in the territory in which the laws of Chili have once more resumed their sway, every guaranty for the protection of their persons and interests.*

"I avail myself of this opportunity to reiterate to your Excellency the expression of the sentiments of high consideration with which I remain,

"Your Excellency's assured and obedient servant.

"ALEXANDER FIERRO."<sup>a</sup>

The Chilean Commander in the field, upon assuming possession of the Littoral "up to the river Loa," issued, under date of March 25, 1880, the following proclamation:

"I, Marco Aurelio Arriagada, Commandant General of Arms of Antofagasta, and Chief of the Forces of occupation of the Territory comprised up to the river Loa, in virtue of the faculties which belong to me from the military authority which I exercise, make known to all the inhabitants of the said Territory:

"Inasmuch as, to the north of the 23d parallel, and as far as the river Loa, there are no authorities who may administer civil justice in all its branches, and criminal justice for ordinary offences, and the imperious necessity of attending to this important public service being evident, I Decree:

"ARTICLE 1. Let the Judge of Letters of Antofagasta be commissioned in order that he may exercise the administration of civil and criminal justice with respect to the territory which extends from the 23d parallel to the north up to the river Loa, including Calama, and other points which depend on this military district.

"ARTICLE 2. \* \* \*

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<sup>a</sup> I Appendix, p. 263.

"ARTICLE 3. *With respect to landed property situated in the territory to which this decree refers, the Judge shall limit himself, for the present, to secure to the persons to whom by right it may belong, the possession or tenure, or to protect them therein, without judging as yet, respecting the dominion.*

"ARTICLE 4. *In the sentences or decisions which may be pronounced in civil matters, the laws in force in the territory at the time of the celebration of the respective acts or contracts shall be applied respecting that which is judged.*

"ARTICLE 5. *The civil acts or contracts, which may be executed or celebrated fifteen days after the publication of the present decree, shall be judged in conformity with the Chilian laws."*<sup>a</sup>

Under date of April 4, 1879, the National Congress approved a law which ratified the abrogation of the Treaty of August 6, 1874, with the Republic Bolivia, affirmed the occupation of the territory between parallels 23 and 24 of south latitude, approved the declaration of war against Bolivia, authorized the President to carry on the same, and conferred power necessary thereto, including the power to make certain necessary regulations for the government of the territory. This law reads as follows:

"Whereas the National Congress has given its approval to the following

"Projected Law:

"ARTICLE FIRST. *The rescission of the Treaty of August 6th, 1874, which existed with the Republic of Bolivia, is approved and the consequent occupation of the territory lying between parallels 23 and 24 of South Latitude.*

"ARTICLE 2d. Congress gives its approval that the President of the Republic declare war against the Government of Bolivia.

"ARTICLE 3d. The President of the Republic is authorized:

"1st. To increase the forces by sea and land as much as he may deem necessary;

"2d. To use out of the national funds for the present up to four millions of dollars for the purpose to which this law refers, giving the corresponding account of such inversion at such times as the general accounts of public administration have to be rendered;

"3rd. To contract for loans up to the sum of five millions of dollars, with power to hypothecate for payment thereof the properties of the Nation, or to stipulate other guarantees;

"4th. To declare ports of entry all such as he may deem necessary and provide for the service thereof until the passage of a law organizing the same.

"ARTICLE 4th. The use of the public funds decreed by the President of the Republic for the increase, provisioning and mobilization of the National Squadron and the forces of the Army, and for the administrative and customs service at Antofagasta and Mejillones, is approved, the respective account to be rendered in due course.

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<sup>a</sup> II Appendix, p. 230.

"ARTICLE 5th. The authority conferred in Article 3 shall continue for the term of one year.

"And whereas, having heard the Council of State, I have deemed it well to approve and sanction it; therefore let it be promulgated and carried into effect as a law of the Republic."<sup>a</sup>

It is submitted that it is reasonable to assume and contend that under the congressional authority and approval thus vested upon the National Executive, by this act, the act of the Executive and of his agents became thereby approved and ratified and that therefore the proclamation of General Arriagada must be considered as having, at least until superseded or set aside, the force of law. In this connection particular attention should be paid to Articles 3 and 4 of that proclamation, which provide, as already quoted above, as follows:

"Article 3.

*"With respect to landed property situated in the territory to which this decree refers, the Judge shall limit himself, for the present, to secure to the persons to whom by right it may belong, the possessions or tenure, or to protect them therein, without judging as yet, respecting the dominion.*

*"ARTICLE 4. In the sentences or decisions which may be pronounced in civil matters, the laws in force in the territory at the time of the celebration of the respective acts or contracts shall be applied respecting that which is judged."*<sup>b</sup>

While the language of these provisions is not wholly clear, a reasonable interpretation seems to justify the belief that at the period at which this order was given the authorities of the Government of Chile, or at least General Arriagada, contemplated administering the occupied territory in strict accordance with the principles of international law. In other words, the Government of Chile was prepared to recognize, to protect, and to enforce the rights which private parties held in the occupied territory, and particularly "with respect to landed property situated in the territory to which this decree refers."

From the discussion already presented it is clear that under an administration which recognized these principles of law, Wheelwright's full rights, titles, and interests in the government estacas located in the Bolivian Littoral would have been fully and completely protected. It would appear, to be more specific, that under such an administration of law and justice Wheelwright would be entitled to hold the existing government mines free from the susceptibility of denouncement, and that he should be

<sup>a</sup> II Appendix, p. 173.

<sup>b</sup> P. 201 supra.



entitled in accordance with the decrees already issued by the Government of Bolivia and in accordance with the principles underlying such decrees, to be put in possession of the government mines located in the Littoral so soon as and as rapidly as he might desire such action. These were rights to which, as was established in the preceding point, Wheelwright was clearly entitled under his contract, to which the Government of Bolivia had repeatedly recognized him as entitled, and which therefore he might fairly expect the Government of Chile to enforce.

Any failure on the part of Chile fully to recognize, protect and enforce such rights would therefore constitute not only a violation of the recognition apparently promised, but of the principles of international law, as will be more fully set forth hereafter.

It soon became evident that such full recognition and protection were not to be extended to Wheelwright's interests. From the moment the territory passed under the control of Chile Wheelwright encountered innumerable obstacles to the successful enjoyment and operation of the government mines under his contract. In his letter to the American Minister at Lima under date of June 28, 1884, he sets forth the various difficulties which he encounters in the following language:

"It will not be amiss to say that prior to my departure from La Paz, the Government of Bolivia, caused to appear in their official organ 'La Reforma' No. 69 of the twenty-eighth of December 1876 the decrees mentioned in the contract duly executed before the Notary two days previously, and I had same reproduced in a daily paper, called 'El Titicaca.'

"At the same time, I had inserted with the verbal approval of the Minister of Finance a notice, under the heading of 'Estaca Instruccion del Estado in el Littoral' signified government mines in the coast-range or department, informing miners and others, that, in virtue of the decree of 23rd of December, 1876, I was placed in possession of the silver mining sets on the Littoral, that belonged to the said Government; and that all future arrangements connected therewith would be conducted through the writer. The same decree and notice were published in a newspaper of the Littoral called 'El Caracalino' and publication was made in 'El Mercurio' of Valparaiso, Chile, of the decrees referred to. In consequence both Bolivians and Chileans were publicly informed of the nature of the compact to which the mining community of Chileans mainly made open opposition with but *four honorable exceptions*. In fact, there was very manifest an undercurrent of public opinion indicative of extreme animosity, and apparently instigated by some turbulent Chilean residents, which nationality, being in the majority, tended to produce alarm, and materially retarded my progress from the outset. \* \* \*

"When the Chilean military forces occupied the Littoral, I was in Caracoles, doing all that could be done towards the development of

the Estacas de Instruções Publicas, taking into account the hostility with which I was assailed.

"The Bolivian authorities and residents, almost to a man, fled at once, the principal notary, taking with him the archives of his office, thus causing great inconvenience in many cases, and no inconsiderable prejudice in others, especially in mine.

"Finding that no headway could be made in a mineral district, recently occupied militarily, I left my Agent (a German) in Caracoles, and went to Antofagasta. This was in the latter part of February, 1879, and I have there since resided, beset by numerous expensive and annoying lawsuits, emanating from unfriendly action in general, when the reverse or at least neutrality should have been the case. To such an extent was this carried, that I was called a Bolivian spy, merely because I held a contract *pledging* to me property belonging to that government which had been until within a short period on friendly relations with Chile, and an ally during the Spanish war.

"Notwithstanding this memorable and almost untenable position, I continued to exercise endeavors, attended by outlay and vexations, towards maintaining the indisputable rights ceded in my favor, as liquidating partner of the firm herein mentioned. This had been prolonged with more or less activity up to the present time, as can, if requisite, be attested to by competent witnesses, and proven by documentary evidence.

"My pleadings before the Chilean tribunal of Antafagasta were in some instances partially favorable, but the suits were generally carried to the Court of Appeals in Serena, in which I was obliged to employ legal counsel as well.

"Before that tribunal I met with adverse decisions thro' an unwarranted display of patriotism, or other uncomprehensible reasons, which gave additional courage to my opponents, and increased my embarrassed situation. Without doubt, the main points at issue were evaded by the Judges, completely ignoring the Bolivian laws, as well as what might have been expected on International grounds, judging from numerous precedents.

During the year following the occupation already cited, it might be said that there existed uncertainty, varying according to circumstances, whether the Littoral of Bolivia would remain in the hands of the Chileans, or be retaken by the allies, and, as a matter of course, that part of the country was kept in a continual state of ferment, which only began to calm down after the capture of the Peruvian ironclad 'Huascar' on the eighth of October, 1879.

"Even then, some time elapsed before tranquillity was restored, and meanwhile although fiscal and other regulations prevailed in conformity with instructions from the Chilean Government, municipal and other laws were left in abeyance thus manifesting some doubts on the part of the victor. According to my way of thinking, it would strike the most casual observer, that during that period, many of the Bolivian laws, inclusive of the mining code, should have reigned supreme. Such a measure would have been at all events less prejudicial, even under the otherwise unfavorable surroundings, such as scarcity of labor, high prices of provisions, etc., than the arbitrary course pursued regarding the Estacas.

"As the naval and land forces moved northward, Chile took possession of various ports along the coast, and I was consequently, unable to instigate any action, connected with the second clause of the Bolivian Government's decree of 24th of December 1876, as Arica and other ports were under Chilean control, by their military occupation of same.

"On account of all these drawbacks, which tested ones patience almost beyond endurance, I became wearied as to hoping for any effectual remedy from informal intimations relative to my harrassing position; and addressed the Government of Chile under date of 11th of September, 1882, as per translated copy, marked D, which is accompanied, for the information of Your Excellency as regards the purport of the original petition presented as above. Spanish copies of my contract with Bolivia, and other documents relating thereto were appended, and these in translation take their appropriate places in this detailed representation for Your Excellency's consideration and attention, as respectfully solicited.

"As for a very long period after the declaration of war by Chile, my efforts were so seriously hampered as to prevent the fulfilment of any project regarding the organization of a company or companies for the development of the government mines ceded by Bolivia, I could but feel that then if not before, the time had certainly arrived for a ready response, and that Chile would willingly discountenance a further unjustifiable invasion of my rights so uninterruptedly defended without success before the Chilean Tribunals.

"But no! there was neither applied the 'in statu quo' principle, until the belligerent horizon should be more clearly defined, nor did the supreme government of Chile think fit to give a decisive reply to my appeal. My petition would appear to have unnoticedly passed from one Ministry to another until reaching that of justice, when its incumbent waived the essential points and entirely eluded their importance in the question at issue, by a groundless insinuation touching diplomatic intervention. Accompanied under mark E Your Excellency will please find a translated copy of the decree of the Minister of Finance, dated Santiago, the eighteenth of October 1882—as far as I have been able to learn, the usual custom of publication in the bulletin was not followed in this instance.

*"The allusion therein to a presumed diplomatic course was without foundation, and only tends to show what subterfuges are resorted to, in order to evade direct responsibility. This method may serve for a time, but the day of straightforward, undisguised reckoning should, and, I think, will come.*

"My subsequent abstention from an appeal to my Government for protection is ample proof of my pacifically inclined intentions and I continued on, confiding in the reiterated declarations of Chile about honorable dealings, which I charitably thought would be adopted, and that perhaps the opportune moment had not come. It resulted that new Cabinets were formed and their incumbents gave promises that were never fulfilled.

"Though 'patience ceased to be a virtue,' still I persevered, under the cherished belief that as the war approached its end, I would be fairly and mayhaps generously treated in recompense for my quiet adherence to the rights involved. Most woefully was I disappointed, and

thus compelled to make a journey here, it being well known that even the worm, when trampled upon, will turn. This absence from my post could moreover not be avoided, as the United States Minister to Chile had not been there since February last, and the occasion was *pressing*, as will be hereinafter stated.

"The prejudices from the commencement arose from the frequent evidence of undue encroachments on, and disappearance of many of the boundaries of my mining sets, as well on the interior workings, that it irremediably deteriorated their actual, and also their prospective value. Moreover, the Chilean mining jurisdiction, so distinct from that of Bolivia, caused serious inroads, which it was beyond my power to counteract, and interminable lawsuits gave scope for usurpation, robbery of metal, etc. These evils could not be controlled as the Government of Chile would not be induced to listen to my just solicitations; and during all these years, I had not arrived at the desired goal of being able to offer to the public for investment therein, the mining properties referred to, free from incumbrance, and in the certainty of retaining undisputed possession of same." <sup>a</sup>

Other and disinterested writers have given the same sort of picture of the conditions which confronted Wheelwright at this time. Jorje Rodriguez Cerda, in his essay on the "Estacas of Education of the Government of Bolivia," writing from Antofagasta, on October 5, 1880, makes the following statement in the introduction of his discussion:

"THEIR ORIGIN.—LEGAL EXISTENCE.—What claim (estaca) next following those of the discoverer, is measured off to the Educational fund? Did the provision of the Decree of the year 1852 embrace the third one next following those of discoveries made of a virgin vein in workings already known? Is the Government of Chile by the fact of conquest and recovery (revindication) bound to respect the contract which the North American citizen, John Wheelwright, made with the Government of Bolivia concerning the exploitation of said estacas?

"I have here, Your Honors, the question which is the subject of the essay which I present to you on the occasion of my seeking the Degree of Bachelor of Laws and Political Science.

\* \* \* \* \*

"The origin of most important lawsuits wherein are involved varied interests, an unceasing theme of the conversations of the miners of all Antofagasta: font of disturbances and heated discussions; a cause of complaints and of a concentrated hatred for those who see in them only the protection of arbitrary acts and abuses wherewith at another time unjust rulers, demonstrated their power; the subject of most important researches concerning Bolivian legislation and international law; and finally, the object of a judicial decision concerning the conflict of rights and legislative enactments which perchance will later serve as the criterion for other nations."

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<sup>a</sup> I Appendix, p. 18.

These untoward circumstances and conditions in which Mr. Wheelwright found himself placed in connection with his attempted operations of the mines in the Littoral were brought directly to the attention of the Chilean authorities in a communication addressed to them by John Stewart Jackson, acting as attorney for John Wheelwright, in which Mr. Jackson made the following comments:

"As will be seen by the documents presented in copy, immediately after signing the contract with the Bolivian Government, John Wheelwright had to contend with a thousand difficulties. In the first place, other persons had unlawfully taken possession of the mines, taking down the boundary marks; secondly, others who were working adjacent mines, availing themselves of the neglect in previous years on the part of the Government, had penetrated into the Government mines, robbing the riches; and, thirdly, the authorities on the coast did not give the requisite aid, some of them being interested in the spoil. It was therefore necessary, in many cases, to ask either for the remeasurement of the mines, or for the replacement of the boundary marks (which had been taken away), in conformity with the original documents; a number of lawsuits were followed up against the delinquents for unwarrantable encroachment or occupation. In the two years previous to the Chilean occupation but little was obtained, as most of the original documents were lost in the tidal wave at Cobija in the year 1877, and afterwards, owing to the war, the registers were taken to Bolivia.

\* \* \* \* \*

"The parties who have unwarrantably taken possession of the Estacas, taking out large sums, have raised a crowd of protests against the existence of the Estacas, as if John Wheelwright had deprived them of their ground, when it has been exactly the contrary.

\* \* \* \* \*

"In what has he damaged industry or private rights? Notwithstanding, people denounce the Estacas, which they have not desired to work legitimately, by arrangement with John Wheelwright, alleging that they are unappropriated property (*terrenos baldios*) without titles; they even denounce the Estacas which John Wheelwright has worked himself, or by contract, from the commencement of his contract, amongst them the Estaca 'Flor del Desierto,' ceded by the Bolivian Government specially for the payment of the interest of the debt to Alsop & Company and which has been constantly in work since the year 1876, by a contract with the Company 'Esplotadora de Caracoles.'

"Even conceding the validity of the contract of John Wheelwright with the Bolivian Government, some parties attempt to render it illusory, endeavoring to apply the mining laws of Chili to this case; but if the contract be valid, as I have proved, it ought to carry with it all the franchises which it had legally at the time of the concession, otherwise the contract would be onerous, and would not fulfil its object, which was the payment of the debt due to Alsop &

Company, and amongst said franchises is that of legal protection, it being property of the State; without this the contract would lose all its value, as John Wheelwright would be obliged, in order to preserve his right of usufruct, to work each one of the Estacas mines which the adjacent mines would not work, thus spending enormous sums with evident loss, and without hopes of regain, on account of the small extent of the mines.”<sup>a</sup>

Again, in another petition presented to the Chilean authorities for and in behalf of John Wheelwright, Mr. Jackson recapitulates the difficulties in which Mr. Wheelwright found himself placed, in the following language:

“But the three years granted to him for the exploration of the mines had not yet been terminated when the war with Bolivia broke forth, since when, either because of the exceptional situation created on the Coast by the war, or owing to the fact that his rights were ignored by the miners interested in keeping or taking possession of some of the Estacas or interpenetrating them, Mr. Wheelwright has been very far from succeeding in organizing, as he had intended to, the working of the Estacas, and has been compelled to maintain his rights by carrying on with many persons very expensive lawsuits which have taken up a large part of the time which he had for developing the working of the mines. In fact, as many of the laborers on whom the mining industry on the Coast relied, enlisted in the army, the number of hands, became so scarce that it oftentimes became necessary to reduce or stop work in some mines for the lack of workmen. It is not difficult to understand that all these obstacles were much more serious for Mr. Wheelwright, who had so many mines that it was to his own interest to keep working either personally or by means of contractors.—As to the second of the above noted circumstances, certain individuals moved by their personal interests and believing either truly or pretending to, that the boundary treaty with Bolivia of the year 1874, having been rescinded, and the territory included between S. latitudes 23 and 24 having been occupied by Chile, the contract of 26th December, 1876 had become extinct, looked upon the Public Instruction Estacas as vacant lands and attempted to deprive Mr. Wheelwright of his rights to the same, by means of petitions or denunciations notwithstanding that according to Supreme resolution of Bolivia they are not subject to denunciation; removing boundaries to destroy their individuality or interpenetrating his squares. And there have not been lacking some who applying that theory even to Estacas situated outside of the territory which it is said has been revindicated and is merely under military occupation, have created for Mr. Wheelwright respecting these the same kind of difficulties just mentioned. Of course, each of these assaults which have been repeated very frequently ever since the beginning of the war, has obliged Mr. Wheelwright to enter a long and expensive suit, in order to avoid the despoilment of which it has been sought to make him the victim.”<sup>b</sup>

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<sup>a</sup> II Appendix, p. 135

<sup>b</sup> II Appendix, p. 203.

Similar expressions were repeated in a further petition under date of November 21, 1883.<sup>a</sup>

To the complaints thus made in these petitions, the Government's attorney, under date of October 9, 1884, reported to the Minister of Finance as follows:

"The most that can be demanded from the Government in possession is that, without declarations of any kind, it should, '*de facto*,' respect the order of things which existed before the occupation.

"And, in reference to this point it must be remembered that Mr. Wheelwright does not charge the Government of Chili nor any of the Chilean authorities with any act of disturbing that position of affairs.

"The impediments and difficulties of which complaint is made, arise from acts done by particular individuals, who, as it is stated, are only acting from personal interest. In this class of difficulties the Government cannot interfere. The controversies between individuals, whatever may be their origin, and the questions which may arise regarding their rights, must be ventilated before the tribunals of justice."<sup>b</sup>

*Wheelwright before the Chilean courts.*—It was while matters were in this unsatisfactory condition that Wheelwright brought, amongst almost two hundred other suits, one suit to secure possession of the government estaca *Amonita* and another suit for the possession of the government estaca corresponding to the mine *Justicia*.

(1) *The case of the Amonita.*—The decision in the *Amonita* case is dated Antofagasta, the 2nd of May, 1882. The court stated the facts in the case as follows:

"Mr. Theodore Hohmann, for John Wheelwright, sues Mr. Benigno Barrios in order that it may be declared that the mine *Amonita* belongs to the Bolivian State, whose rights his constituent represents, condemning him to the restitution thereof, together with the products received during the time of his possession.

"Founding the claim of folio 29, and in the name of Mr. John Wheelwright, he says: That, in conformity with the clauses of the respective contract, he demanded the delivery and possession of various of the mining sets called *Fiscal*, enumerating amongst them the one corresponding to the lode *Blanco Torre* and that the Deputy of Mines being located on the ground which should be measured in order to deliver to him the possession of the estaca referred to, Mr. Benigno Barrios opposed himself to the said proceeding by which is asked the deliver of the Government estaca which he unlawfully retains with the name of *Amonita* and the adjudication of which he obtained surreptitiously owing to his having denounced it under the false conception of its being private property."<sup>c</sup>

<sup>a</sup> II Appendix, p. 262.    <sup>b</sup> II Appendix, p. 279.    <sup>c</sup> II Appendix, p. 121-122.

Upon this statement of facts the court rendered the following decision:

"Considering; 1. That the territory comprised between the 23d and 24th parallels of south latitude, being occupied on the plea of revindication, by the Chilean arms, and the rupture of the treaty of the 6th August, 1874, being approved by the law of the country of the 3d April, 1879, Chili recovered the dominion over the National possessions which Bolivia had acquired in virtue of that treaty.

"2. That Mr. John Wheelwright has fully recognized and established, by the declaration of the witnesses, who reply to the interrogatory of folio 218, that the mine *Amonita* denounced on account of abandonment, by Mr. Benigno Barrios, and actually occupied by him, was the estaca of Instruction of the mine 'Blanco Torre.'

"3. That, amongst the National possessions of Bolivia, recovered by Chili, the estacas of Instruction, established by the Supreme Decree of the 23d July, 1852, were numbered.

"4. That the Convention celebrated on the 24th December, 1876, between the Bolivian Government and Mr. John Wheelwright, partner and representative of the mercantile house of Alsop and Company, according to the terms of the public deed, which is extended at folio 180, was a contract of 'anticresis,' in which the Government of Bolivia conceded to Mr. John Wheelwright the estacas of Instruction of the mines of what was then called the Littoral of the North, in order that, for the term of twenty-five years, he might pay himself with their products, the sum of eight hundred and thirty-five thousand Bolivian dollars, and the interest thereof, which the said Government acknowledged to owe him (Article 2435 of the Civil Code).

"5. That this same classification has been made in the pleading of folio 136, and accepted by the Most Illustrious Court of Serena, confirming the said pleading at folio 151.

"6. That the 'anticresis' does not, by itself alone, give to the creditor any real right over the immovable estate subject to it, not even after the delivery which perfects the contract, according to Article 2437 of the Civil Code.

"7. That Mr. John Wheelwright, not having a real right over the estacas of Instruction ceded by the said contract, nor that which the defendant possesses with the name of *Amonita* having ever been delivered to him, he cannot shelter himself, even under the doctrine of those authors of the Theoretical Right of Nations who, recognizing the positive principle of real right which authorizes the conqueror in a war to appropriate all the possessions which form part of the public domain of the hostile State, nevertheless counsel the Nations who conquer a territory to respect the real rights constituted in fiscal possessions of the Nation whose the conquered territory is; nor less to make good his 'anticretic' and imperfect title against a private person, the possessor of a mine, which, with all others of the Littoral of the North, came to be National possessions of the Republic of Chili, by the revindication and effective occupation of the said Littoral, and to be governed by our Mining Code.

"8. That if the demand of folio 29 should be admitted, and, logically, all those which claim the return to the Bolivian Government of the estacas of Instruction of the mines situated between the 23d



and 24th parallels of South latitude, the evident inconsequence would result that all the tribunals of Chili would restore to the Republic of Bolivia most important parts of the territories revindicated and occupied by the arms of our Republic, and:

"9. Finally, that these premises being established, and it being necessary to decide in conformity with them, there is no occasion to ascertain or decide if the contract was legal or not, in virtue of which the declaration has been asked in the demand of folio 29, that the mine 'Amonita' belongs to the Bolivian State, nor to pronounce respecting the validity of the abandonment of the said mine, and the prescription, of which the defendant has availed himself, in support of his right to the said mine.

"In virtue of these considerations, and of the said dispositions of Article 591 of the Civil Code, and law 32, title 16, page 3, the demand of folio 29 is declared to be without foundation.

"Let it be noted.

"(Signed) FERENZALDIA.  
"(Signed) MUJICA."<sup>a</sup>

It will be observed, from the statement of facts, that the defendants in this case based their claim to possession and their right to retain possession on the fact that they had denounced the mine which was admittedly a government estaca. This point was recognized in the second paragraph of the court's decision. The court held, sustaining this contention, that notwithstanding the mine was admittedly a government estaca, and notwithstanding the defendant in the case claimed title by virtue of his denouncement, yet the defendant and not Wheelwright was entitled to the possession of the mine.

It is believed that, in view of what has been already set forth regarding the rights, titles, and interests which under Bolivian law Wheelwright possessed in the government estacas, among which was the right to hold them free from the susceptibility of denouncement, which it is submitted has been fully and completely established above, this ruling of the court at Antofagasta constituted a clear violation of the rights, titles, and interests, which, under his contract, had accrued to Wheelwright in the government estacas and that, therefore, this decision operated as and constituted a wrongful deprivation of certain rights, titles, and interests possessed by Wheelwright, for which action the Government of Chile is liable to respond in damages under the well-known and universally recognized principles of international law hereafter fully set forth. The amount of damage suffered because of this judgment of the court and the announcement of this principle will be fully set forth under Point IV, *infra*.

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<sup>a</sup> II Appendix, pp. 124-126.

(2) *The case of the Justicia.*—The facts in the second case, that of the *Justicia*, were set forth by the court of first instance, in an opinion rendered May 14, 1881, as follows:

"In the suit which, respecting encroachment, John Wheelwright prosecutes against the partners of the mine *Justicia*, the latter presented a report and three plans made by the engineer of the State, Mr. Enrique Cavada, from which it appears that the mines *Demasias Fisher*, united to the *Demasias Caracoles* under the name *Fusion* and a part of the mine *Tarija*, occupy the ground which belongs to the Estaca of Instruction of the mine *Justicia* inasmuch as being of more recent origin than the estaca, they extend towards the south and southwest of the mine *Justicia*, the direction in which it was measured in 1871, as it appears from the attested copies at folios 28 to 36.

"In consequence of this Mr. John Wheelwright has presented himself, according to folio 8, entering a claim against Mr. Benjamin Fisher, Mr. Maximo Julio, Mr. Belisario Salinas, Mr. José Jacinto Gaete and Mr. Camilo Ocaña, and asking that the claim at folio 10 of the annexed pamphlet (cuaderno) may be argued with them in order that it may be declared that they ought to deliver up the part of the ground which they have occupied, and pay the value of the metals which they have extracted therefrom, it being their duty to put him in possession of the Estaca of Instruction."<sup>a</sup>

Upon this statement of facts the court delivered the following opinion:

"Considering: 1. That the decree of the 23d July, 1852, in recognizing the dominion of the State over every description of metallic lode which might be found in its territory, enacted that in every mine or lode of silver, gold or other metal whatsoever, the interest or estaca following those which may correspond to the discoverer or denouncer, according to the existing statutes, is applied of full right to the Treasury of Public Instruction.

"2. That the statutes to which the decree refers, are no others than those of Mexico, those of Peru, and the ordinances of New Spain, whose observance was prescribed by the Royal Schedule of the 8th December, 1785, which expressly ratified, in the 32d declaration, the subsistence of the estaca reserved for the King by the 18th ordinance, 1st title of those of Peru, but this having to be measured after the sets of the discoverer.

"3. That the independence of Bolivia being proclaimed, there was declared subsisting, by order of the 5th August, 1829, the old ordinances and especially those of Mexico already adopted by Peru, and which continued in force until the year 1852.

"4. That, according to this, the decree of the 23d July of this year, enacted nothing new respecting the interest which in every mine belong to the State as successor of the Crown; it only determined to what branch of the service the product should be applied.

"5. That, although in the pleadings there is no evidence that the said decree would be submitted immediately to the approval of the

<sup>a</sup> II Appendix, p. 99.

Legislative Chambers, as is ordered therein, there have been published, after it, various dispositions embodied in laws, decrees, orders and dispositions, which recognize and sanction the legal existence of the estacas destined to public instruction, and regulate their exploitation, as, amongst others are the circular of the 21st May, 1860, which ordered that the decree of the 23d July should be made effective, the decree of the 29th September and 9th October, 1871, respecting the estacas belonging to the State, the law of the 12th of the same month and year declaring the estacas of instruction to be imprescriptible, the law of the 19th October, of the said year, which empowers the executive to celebrate respecting same contracts of letting or for working them in partnership, the law of the 15th November, 1873, which directs that the Government may proceed to take possession of them, and many other dispositions which it would be tedious to enumerate.

"6. That the constitutionality of the decree being established, and consequently, the legal existence of the estacas of instruction, it is incumbent to know if the decree which recognized that existence has or has not been derogated by the Mining Code of Bolivia, promulgated on the 10th August, 1852.

"7. That the first article of the additional ones of the said code establishes that 'all law suits about mines shall be decided by the new code, all the other ordinances, laws, decrees and special regulations which may be opposed thereto remaining null and void.'

"8. That whatever may be the scope which may be given to this disposition, the derogation of the decree of the 23d July, 1852, will never be discovered in it, because the Code does not contain any disposition which may imply relation with the estacas of instruction, nor did it create a new interest in favor thereof nor suppress the existing one.

"9. That, far from this, subsequent thereto, innumerable dispositions were dictated, which, as has been said in the fifth consideration, had for their object either to recognize and sanction the rights of instruction with respect to the estacas, or to regulate conveniently the exploitation thereof, it being fitting to note, in addition to those already indicated here, and, amongst others, the decrees of the 7th March, 29th May and 19th October, 1872, by which tenders were invited for the working of the estacas in conformity with the already cited laws of the 19th October, 1871, the order of the 13th February, 1874, in which notice is given to the Public Ministry to revindicate the estacas mines of the mineral district of Aullagas, the order of the 24th of the same month and year, which is given to the Attorney-General in order that he may take possession of the said estacas, the circular of the 21st April, 1874, which contains instructions for the same object and with respect to the mining districts in general, and lastly, the contract celebrated by the Government of Bolivia with the plaintiff on the 23d December, 1876.

"10. That it is impossible to presume that, with reference to the decree of the 23d July, there should have been in the long space of time elapsed since 1852, so considerable a number of laws, gubernative dispositions and judicial decisions, if it had been derogated by the Mining Code.

"11. That the constitutionality of the decree referred to, and its actual obligation being established in virtue of the preceding con-

siderations, it is necessary to ascertain, in succession, the estaca which corresponds to instruction, which, according to the defendants, would be only the fourth in continuation of the three which were measured to the discoverer.

"12. That the 15th article of the Bolivian Mining Code terms discoverer him who finds metal in any lode, vein, &c., &c., on the surface or in the depth of the ground, and the 16th article concedes to the discoverer who may register a lode in virgin ground, three estacas on the lode discovered, and the 19th article two to the discoverer of a lode in ground known and worked in other parts.

"13. That the 1st and 2d Articles of Title CI of the Ordinances of Mexico, contained precisely the same dispositions.

"14. That the 1st Article of the Decree of 1852 in declaring that in every mine or lode of any metal whatsoever, the interest or estaca following those which may correspond to the discoverer or denouncer, according to the existing statutes, would be applied of full right to the Treasury of Public Instructions, has evidently referred to the Ordinances of Mexico, which, as has been stated in the third consideration, were declared subsistent in Bolivia, by order of the 5th August, 1829,

"15. That said first article, not making any distinction between the two classes of discoverers which existed at the time in which these ordinances were cited, and which the same Code recognized afterwards, and if both considered as a discoverer him who should find a lode in virgin ground or in worked ground, it is evident that the law reserved to Instruction the fourth estaca in the first case, and the third in the second.

"16. That the preamble of the decree of the 23d July, 1852, which says: 'The fourth estaca of every mine or lode, &c., is adjudicated to the Treasury of Public Instruction,' ought not and cannot be taken into account as much for not belonging to the decree nor appearing in the official edition, as because, even if it did, it is not in consonance with the decree, and the resolute part of the latter would prevail over the former.

"17. That yet the circular of the 1st March, 1860, and the decree of the 29th September, 1870, which only speak of the fourth estaca in continuation of the discovered ones, and which the defendants call to their aid, were, nevertheless, reformed, and the Government made it also extensive to the third estaca by the circular order of the 9th October, 1871, making it in conformity with the dispositions contained in the 16th and 20th articles of the Mining Code.

"18. That, conforming himself thereto, the Prefect of Cobija resolved in the same sense on the 14th November, 1873, a resolution which, being revised by the Supreme Government, was approved in December of the same year.

"19. That the effectiveness of the said decree of the 23d July being proved, and that there belongs to Instruction the fourth or the third estaca respectively, in continuation of those which may be measured to the discoverer of a lode in virgin or worked ground, it is fitting now to examine the validity of the contract celebrated between the plaintiff Wheelwright and the Government of Bolivia, a contract which gives rise to three questions which the defendant propound.

“(1) If that Government could celebrate the contract without infringing the treaties.

“(2) If the Laws of the Country authorized it for the celebration thereof, and

“(3) If Chili, as revindicator of this territory, ought or ought not to respect it.

“20. With respect to the first point that although it is certain that on the 13th February, 1874, the Government of Chili, by means of Consul Reyes, declared that it did not acknowledge nor accept on its part the contracts, settlements or arrangements which the Government of Bolivia might celebrate or accord, in so far as they may impose burdens on or effect the territory of common participation; it is also true that in virtue of subsequent negotiations, the treaty of the 6th August of the same year was signed between the two Republics, by which Chili renounced in favor of Bolivia, all her rights to the territory of the said common participation.

“21. That the high dominion belonging already to her over the territory, she could proceed, unencumbered, to the celebration of the contract with Wheelwright on the 23d and 24th December, 1876, in virtue of which she recognized to him, as representative of the house of Alsop & Company, the credit of eight hundred and thirty-five thousand Bolivian dollars, at the interest of five per cent. per annum, which was to be amortized, amongst other things, with forty per cent. of the product of all the estacas-mines of silver of the Coast Department, which were adjudicated to him for twenty-five years.

“22. With respect to the second point, namely, if the Government could celebrate contracts; that by the law of the 19th October, 1871, the Executive was authorized to celebrate contracts of letting or of working in partnership all the estacas-mines belonging to the State in the mineral districts of the Republic, and in conformity therewith, tenders were invited for the working of the said estacas by the decrees of the 2d November, 1871, 7th March, 29th May and 19th September, 1872, the whole concluding with the celebration of the contract with Wheelwright.

“23. That two years afterwards, on the 12th February, 1878, (fol. 118) the National Assembly approved the measures dictated in the Department of Finance by the Provisional Government inaugurated on the 4th May, 1876, excepting those which had been derogated or modified by express disposition thereof, amongst which the contract with Wheelwright does not appear.

“24. With respect to the third question, if Chile, as revindicator of this territory, ought or ought not to respect the contract celebrated between the plaintiff and the Government of Bolivia, that its nature being borne in mind, and on account of the consequences which it involves, it ought to be decided according to the principles of international right, and on that account, the cognizance thereof corresponds to another Tribunal, in conformity with the 117th Article of the Law of the 15th October, 1875.

“25. That while that does not take place or the titles of plaintiff are not opposed by whom and how it may concern, the latter has a perfect right to make it good at law, or to demand that which, through them, may be due him.

“26. That such being the case, there is no need to take this question into consideration, and less to treat of deciding it, as the defendants

desire, in conformity with the disposition which the Chilian Civil Code contains respecting revindication; it is impossible to apply thereto the laws of private right, which have for their object the regulating of the respective interests of private individuals between themselves in what may concern their persons, their goods and their agreements.

"27. With respect to the question of fact of the present demand, namely, if an Estaca of Instruction of the mine *Justicia* was measured in the course, &c., which the plaintiff has proved, when the mine *Justicia* was measured in 1871, there was also measured, and in the same act, the corresponding Estaca of Instruction (Interrogatory, fols. 97, 101, 103, 131, 132 and 138).

"28. That, in the same manner he has established, by the proof rendered, that the Estaca was measured and that it was bounded on the south of the mine *Justicia* with a slight inclination to the west, and contracting itself with the mine *Saturnina* (Interrogatory, folio 146, 2d question; and Interrogatory, folio 138).

"29. That, as it appears from the evidence at folio 6, pamphlet I, when in October, 1878, the mine *Justicia* was measured for the second time to Mr. José Maria Blacutt, who had then denounced it on account of abandonment, Mr. Benjamin Fisher objected to the operation being performed, asserting his right to the ground of that which, in the first measurement, had belonged to the Estaca of Instruction, but his opposition was rejected in legal form for want of titles, and that of the representative of the actual plaintiff, Mr. John Wheelwright was accepted, all which is corroborated by the said Blacutt in declaring to the tenor of the interrogatory of folio 146.

"30. That likewise the plaintiff has established that the houses of the mine *Cleopatra* were constructed later than 1871, within the ground of the Estaca of Instruction, today of the mine *Fusion*.

"31. That he has also proved, not only by the declarations of the witness who answer the interrogatories of folios 130 and 135, but also by the questions answered by Mr. Benjamin Fisher, at folio 112, and by Mr. José 2do Cortez at folio 111, that the mine *Fusion*, composed of the *Demasias Fisher* and the *Demasias Caracoles*, is situated on the southern head, with an inclination to the south-west, of the mine *Justicia*, and, consequently, on the ground which belonged to the Estaca.

"32. That, consequently, the position of the Estaca can be no other than that traced by the engineer, Mr. Makotiere, on the plans A. C. of the Government Engineer.

"33. That, with the proof rendered to the tenor of the interrogatories of folios 97 and 135, and the positions of folio 112, it has been established that in the early part of the year 1879, metal of good ley was extracted both from the mine *Fusion* and the mine *Justicia*, which were then in communication.

"34. That, although the defendants, in the allegation of 'well-proved,' claim to have destroyed the contrary proof with that which they say they have rendered, it does not, withal, appear in the pleadings; and, on the contrary, from the certificate of publication of evidence at folio —, it appears that they have not rendered any.

"According to the preceding considerations, and in conformity with the 1st and 2nd Laws, 14th title, 3d paragraph, and the 1698th Article of the Civil Code, it is declared: That the demand is well

founded, and consequently, First.—That the defendants ought to deliver to Mr. John Wheelwright the part of ground of the Estaca of Instruction which they have invaded, together with the value of the metals which it may be proved have been extracted from the mine *Fusion*, and, Secondly—That they ought to put him in possession of the said Estaca of Public Instruction.

"Let it be noted.

"(Signed)

TAGLE, J.

"(Signed)

MUJICA, V." <sup>a</sup>

It will be observed that this decision was in favor of Wheelwright and that under it those who had occupied and exploited the estaca to the mine *Justicia* were directed to deliver to Wheelwright that part of the estaca which they had invaded, together with the value of the metals which he might prove they had extracted.

The defendants in the case took an appeal to the court of second instance at Serena, which on the 19th of May, 1882, delivered the following opinion reversing the court of first instance:

"Reproducing the expository part of the sentence in first instance, and considering—

"1. That the convention celebrated in the City of La Paz on the 26th December, 1876, between the Government of the Republic of Bolivia and Mr. John Wheelwright, representative of the firm of Alsop and Company, is a contract of 'anticresis' by which convention there was recognized in favor of this firm a debt of eight hundred and thirty-five thousand Bolivian dollars, and there were adjudicated to him the estacas-mines of silver belonging to the State in the Coast Department, in order that the said debt should be paid with forty per cent. of their net products during the term of twenty-five years.

"2. That on that contract Wheelwright founds the demand of folio 1, in which he asks that the defendants may deliver up to him the part of ground of the Government estaca of the mine *Justicia*, situated in the mineral district of Caracoles, which they have invaded.

"3. That from the act of measurement of the said mine *Justicia*, executed on the 12th October, 1878, which is extended in attested copy at folio 6 of the added writing, it appears that the Government estaca was not measured on that lode, on account of the Deputy of Mining having so ordered it, in consequence of the ground which the said estaca should have occupied being in dispute.

"4. That it has not been shown that in the time elapsed since that day, the 12th October, 1878, until the date on which the district of Caracoles was reincorporated in the territory of the Republic of Chili, the said estaca should have been measured and the plaintiff put in possession of it.

"5. That from such antecedents it results that the said estaca did not have real and positive existence, nor in that which relates to it, did the said contract of the 26th December, 1876, have full effect while the district of Caracoles remained under the dominion of the Republic of Bolivia.

<sup>a</sup> II Appendix, pp. 111-118.

"6. That the plaintiff has asked that effect may be given to that contract celebrated in Bolivia and with the Government of that Republic, and supporting his claim on the privileges which the laws of that country conceded to the estacas mines called of Instruction when the territory in which the mine treated of is situated has returned to the dominion of the Republic of Chili.

"7. That the effects of the said contract, referring to an immovable property, situated today in Chili, ought to be arranged according to the laws of this country, inasmuch as the sovereignty is indivisible, and it would cease to be so in the present case if the district of Caracoles, which at present is a portion of Chilean territory, should be governed by laws emanated from another sovereign.

"8. That the admission of the demand, by ordering the measurement and delivery of the estaca claimed, would not mean in reality the mere recognition of a right definitely constituted beforehand, but a mandate to the effect that a right should now be constituted in virtue of laws which ought not to rule in any part of the Republic, nor serve as a basis for the decisions of its tribunals.

"9. That the estaca which the plaintiff claims in virtue of his contract of 'anticresis' not having been delivered to him in the time of the Bolivian dominion in Caracoles, and such contract not being perfected except by the delivery of the property, that convention remained without effect with respect to the said estaca.

"In conformity with these bases, and with that which is determined in the 16th and 2437th articles of the Civil Code, and in the 1st Law, 14th title, 3d paragraph. It is declared that the demand of folio I is without foundation. Let the sentence appealed from the 14th May of the past year, extended at folio 230, be repealed.

"This decision has been resolved unanimously. Minister Varas records, in a special opinion, the reasons on which, for his part he founds the repeal.

"Let it be published, and the documents returned.

"(Signed.)	ROJAS,
"(Signed.)	VARAS,
"(Signed.)	CAVADA,
"(Signed.)	AJUIRRE." <i>a</i>

The errors in this decision are numerous.

In the first place, it was held that this was a contract of anticresis. It has however been conclusively shown above that this is not a contract of anticresis, but an interest analogous to a leasehold interest, which interest was granted under express authority, authorizing the sale or leasing of the government mines, but not authorizing the disposition of them under anticretal contracts.

Having announced this fundamental error, the Court next found or held that the government estacas had never been "measured on that lode"—"in consequence of the ground which



the said estaca occupied being in dispute." Although as a matter of fact it might have been true that the government estaca had not been actually measured off, and for the reason given, yet as has been clearly shown above, this was, as a matter of law immaterial since the Government of Bolivia over and over again directed that Wheelwright should be placed in possession of the government estacas held adversely to the Government, even though these adverse and trespassing possessors called "to their aid the plea of good faith."

The decision then asserts that it has not been shown that the "said estacas should have been measured and the plaintiff put in possession of it" prior to the occupation of the territory by the Chilean forces. This statement completely ignores the terms of the contract as well as the terms of the various laws and decrees upon which the contract was founded and the repeated orders issued by the Bolivian Executive commanding the local administrative officers to place Wheelwright in possession of the mines.

The court next found "that from such antecedents it results that the said estaca did not have real and positive existence—while the District of Caracoles remained under the dominion of the Republic of Bolivia." It is believed that it has been conclusively shown that certainly from the decree of 1860, it was the established law of Bolivia that the government estaca belonged to the Government irrespective of the fact as to whether or not it had been actually measured on the lode, and that both Gama and Wheelwright were under their concessions placed in possession of government mines which had been tortiously taken possession of by private parties not representing the State, even where such parties as has just been stated called "to their aid the plea of good faith." Under their concessionary grants as interpreted by the decrees and laws of Bolivia, both Gama and Wheelwright were entitled to immediate possession of all government estacas.

The court next held that the laws of Chile and not of Bolivia were in force in the Littoral, and that "the contract, referring to immovable property, situated today in Chile, ought to be arranged according to the laws of this country." The court here clearly confused the question of the rights, titles, and interests which a private party might possess with the law which should govern an acquired territory. As will be fully shown in the sub-point next

following, it is a fundamental principle of international law that private rights must be respected by a conqueror, particularly where they refer to landed property, and that any violence of this principle renders the conqueror liable to the party injured.

Having reached the above conclusion, the court then held that since this was a contract of anticresis, and since such contract could not be "perfected except by the tradition of immovable property," and since Wheelwright had never been in actual possession of the *estaca* prior to the occupation of the Littoral by the Chilean forces, that therefore the "convention remained without effect with respect to the said *estaca*."

This holding is erroneous because it assumes contrary to the facts and law, that this is a contract of anticresis, and consequently that Wheelwright had no right thereunder to any mines until he had been placed in actual possession of said mines. It is believed this latter point has already been sufficiently discussed to establish that the State's right and therefore the concessionary's right in no wise depended upon but on the contrary was independent of the physical possession, either by the State or by its Agent, of the *estaca*.

Having thus invoked the doctrine that under Chilean law a foreigner was entitled to no more consideration than a national, the court held that the decree of the court of first instance was repealed.

The Government of the United States contends that for the reasons thus set forth this decision, like the decision in the case of the *Amonita*, constituted a clear violation of the rights, titles, and interests which under his contract had accrued to Wheelwright in the government *estacas*; that therefore this decision constitutes a wrongful deprivation of certain of said rights, titles, and interests possessed by Wheelwright, for which action the Government of Chile is liable to respond in damages under the well-known and universally recognized principles of international law hereinafter fully set forth. The amount of damage suffered by the concessionaries under and by reason of this decision will be fully set forth under Point IV, *infra*.

### *Sub-Point F.*

This application of the provisions of the law of Chile to the private vested rights held, possessed, and enjoyed by Wheelwright under his contract, in a way and manner which amounted to and resulted in a deprivation and confiscation of certain of these private vested rights held, possessed, and enjoyed by Wheelwright under his contract, constituted a violation of the well settled and universally recognized principles of international law that a conqueror must respect private rights, for which violation the Government of Chile is liable to respond in damages.

### *Prefatory Summary.*

It is believed that the discussion following hereafter will show that a conquering country is under obligation to recognize and protect private landed-property rights held by private parties—certainly those held by neutrals in territory acquired by conquest—and further that where the laws of the conquering country are not sufficient to protect and enforce such private landed rights, it is the duty of the conquering country to pass the laws necessary to afford such protection.

This has been the position assumed by the American Government in this very case, as is shown by the instruction issued to the American Minister at Santiago by Secretary of State Bayard on March 20, 1886, and the same principle has been frequently announced in the opinions of the Supreme Court of the United States, and likewise in the opinions of various writers upon international law.

### *Discussion.*

The position of the Government of the United States upon this point and in connection with this case was set forth with considerable fullness by Mr. Bayard, Secretary of State of the United

States, in an instruction dated March 20, 1886, to the American Minister at Santiago. The instruction follows:

"No. 24.

"DEPARTMENT OF STATE,

"Washington, March 20, 1886.

"WILLIAM R. ROBERTS, Esq.,

"&c. &c. &c.

"SIR: I transmit herewith, enclosed, the documents presenting and substantiating the claim of Mr. John Wheelwright, an American citizen now residing in Antofagasta, against the Chilean government for wrongs done him as partner of the firm of Alsop & Co. by its non-fulfilment of obligations growing out of the transactions of the Bolivian government with Pedro Lopez Gama of whom Alsop & Co. became assigned in April 1875.

"The petitioner states that while he was proceeding to carry out the terms of a contract made Dec. 24, 1876, between himself and the Bolivian Government, on the basis of the above assignment, his work was interrupted by the war between Bolivia and Chili, which broke out in 1879, and lasted till April 1884. The 'estacas' comprising Mr. Wheelwright's mining operations are included in the territories conquered by Chili and have been occupied by various persons mostly of Chilian nationality, in violation of his vested right. Against these persons Mr. Wheelwright has brought several suits, the first of which was decided in his favor, but the judgment was reversed in the Superior court of appeal at Serena on the 19th May 1882 by a decision given in Section VI of Mr. Wheelwright's printed petition.

"This adverse decision takes the ground that the terms of the contract with the Bolivian government under which Mr. Wheelwright claims, ought to be adjudicated in subjection to the laws of Chili, and not to those of Bolivia; that the estates claimed by the plaintiff under the Bolivian contract not having been delivered to him during the Bolivian dominion that contract remained without effect with respect to them, and that in conformity with these bases and certain articles of the civil code and laws of Chili here cited, Mr. Wheelwright's demand is without foundation and the previous decision is repealed.

"Mr. Wheelwright claims that this and other similar decisions are tantamount to an actual seizure and confiscation of his property, for which he is entitled to compensation, the measure of which is to be determined by his contract with Bolivia of December 24, 1876 with interest added.

"The question that first presented itself, on the hearing in this case, was as to Mr. Wheelwright's nationality. The length of time during which he had been absent from the United States raised in my mind doubts which led me to call for additional proof. I am bound to say that by the proof consequently adduced these doubts have been dispelled. Mr. Wheelwright had undoubtedly been for a series of years resident from time to time in South America as the representative of large business interests in the United States and employed on duties which required from him such residence as a confidential agent. Possessed as he was of the system and details of vast mercantile transactions conducted by a house of long continued and

wide spread activity and high business credit, it was natural that during these years his visits to his home should have been occasional and brief. But there is abundant evidence that he always maintained his position as a citizen of the United States and that he paid an income tax to the United States. There is no proof of any renunciation of his allegiance to the United States or of his becoming naturalized or nationalized in either of the South American states in which he was from time to time resident. Were we to hold that citizens of the United States cannot without forfeiting their nationality reside from time to time in South American states as agents of their countrymen the business of both continents would receive a heavy blow. In affairs so vast, so intricate and so continuous as those of Alsop & Co., for instance, there could be neither consistency nor responsibility of action except through trusted agents, who while taking up continuous abode in their places of business action in South America, would, from early personal relation be in the confidence of their chiefs, making their simple business in this country the place to which their domiciliary duties would relate, and continuing to subject themselves to the laws of the country in which the firm was domiciled. As a matter of public policy, therefore, as well as of international law I cannot but conclude that Mr. Wheelwright's domicile, and nationality are in the United States.

"As to his claim for redress for the wrongs which the present memorial warrants, I have also little doubt. The immense interests he held, in 1879, in his representative, as well as individual capacity, under Bolivian laws, were virtually confiscated, under form of a judicial decision, by the government of Chili, in 1882. Were this confiscation put on grounds of municipal law, or of revolt against municipal authority it might be argued that the decision is one as to which we cannot sit in appeal. But the decision vests on an alleged rule of international law which, assumed as it now is, by the government of Chili, becomes a proper matter of discussion between ourselves and that government. It is asserted by the government of Chili, (for, in international relations, and the maintenance of international duties, the action of the judiciary in Chili is to be treated, when assumed by the government as the act of the government) that a sovereign when occupying a conquered territory, has, by international law, the right to test titles acquired under his predecessor by applying to them his own municipal law, and not the municipal law of his predecessor under which they vested. The true principle, however, is expressed in the following passage cited in the memorialists brief.

"'But the right of conquest cannot affect the property of private persons; war being only a relation of State to State, it follows that one of the belligerents who makes conquest in the territory of the other cannot acquire more rights than the one for whom he is substituted; and that thus as the invaded or conquered State did not possess any right over private property so also the invader or conqueror cannot legitimately exercise any right over that property. Such is to day the public law of Europe, whose nations have corrected the barbarism of ancient practices which placed private as well as public property under military law.' (C. Masse Rapports du droit des gens avec le droit civil Vol. I. p. 123 Sec. 148-149).

"This doctrine has frequently been acted on in the United States. Thus it has been held by the Supreme Court that when New Mexico was conquered by the United States, it was only the allegiance of the people that was changed; their relation to each other, and their rights of property, remained undisturbed. *Leitensdorfer v. Webb*, 20 How. 176. The same has been held as to California. The rights acquired under the prior Mexican and Spanish law, so it was decided, were 'consecrated by the law of nations.' *U. S. v. Moreno*, 1 Wall 400: See *U. S. v. Anguisola* 1 Wall. 352; *Townsend v. Greely*, 5 Wall 326; *Dent v. Emmeger* 14 Wall. 308; *Airhart v. Massieu*, 98 U. S. 491; *Mutual Assurance Soc. v. Watts*, 1 Wheat., 279; *Delassus v. U. S.* 9 Peters, 117; *Mitchell v. U. S.* 12 Peters, 410 *U. S. v. Repertigny*, 5 Wall. 211.

"The government of the United States therefore holds that titles derived from a duly constituted prior foreign government to which it has succeeded are 'consecrated by the law of nations' even as against titles claimed under its own subsequent laws. The rights of a resident neutral having become fixed and vested by the law of the country cannot be denied or injuriously affected by a change in the sovereignty or public control of that country by transfer to another government. His remedies may be affected by the change of sovereignty but his rights at the time of change must be measured and determined by the law under which he acquired them. War is between States, and forms of government may thus be changed and laws are forms of government, but cannot act retroactively to destroy neutral rights. The government of the United States is therefore prepared to insist on the continued validity of such titles, as held by citizens of the United States, when attacked by foreign governments succeeding that by which they granted. Title to land and landed improvements, is by the law of nations a continuous right, not subject to be divested by any retroactive legislation of new governments taking the place of that by which such title was lawfully granted. Of course it is not intended here to deny the prerogative of a conqueror to confiscate for political offences, or to withdraw franchises which by the law of nations can be withdrawn by governments for the time being. Such prerogatives have been conceded by the United States as well as by other members of the family of nations by which international law is constituted. What, however, is here denied, is the right of any government to declare titles lawfully granted by its predecessor to be vacated because they could not have been lawfully granted if its own law had, at the time in question, prevailed. This pretension strikes at that principle of historical municipal continuity of governments which is at the basis of international law. Holding as I do that the action of the government of Chili—here complained of, by which citizens of the United States have been divested of their property, is in violation of this principle.

"I am, Sir,

"Your obedient Servant,

"T. F. BAYARD."<sup>a</sup>

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<sup>a</sup> I Appendix, p. 47.

It is not without interest to note the exact language which has been used by the Supreme Court of the United States in some of the cases to which Mr. Bayard referred in the course of this opinion.

The general principles of law involved were stated succinctly and with some fullness by the great Chief Justice Marshall in the case of the *United States v. Percheman* (1833), 7 Pet., 51, 86, as follows:

"It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change; it would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle: 'His Catholic Majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, by the name of East and West Florida.' A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him; lands he had previously granted, were not his to cede. Neither party could so understand the cession; neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

The learned Chief Justice, had, in the earlier case of *Soulard v. United States* (1830), 4 Pet. 511, announced the same doctrine in the following language:

"In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.

"The term 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace

those rights which lie in contract—those which are executory as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.”

He also announced this principle in a subsequent case in which he said:

“The right of property, then, is protected and secured by the treaty; and no principle is better settled in this country, than that an inchoate title to lands is property.

“Independent of treaty stipulation, this right would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; of transferring lands which had been served from the royal domain. The people change their sovereign. Their right to property remains unaffected by this change.” (*Delassus v. U. S.* (1835), 9 Pet., 117, 133.)

The doctrines thus announced by Chief Justice Marshall were reaffirmed in the case of *Strother v. Lucas* (1838), 12 Pet. 410, 435, 436, where Mr. Justice Baldwin laid down the following rules:

“The State in which the premises are situated was formerly a part of the territory, first of France, next of Spain, then of France, who ceded it to the United States by the Treaty of 1803, in full propriety, sovereignty and dominion, as she had acquired and held it (2 Peters, 301, &c.), by which this government put itself in place of the former sovereigns, and became invested with all their rights, subject to their concomitant obligations to the inhabitants. (4 Peters, 512; 9 Peters, 734; 10 Peters, 330, 335, 726, 732, 736.) Both were regulated by the law of nations, according to which the rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect; and the laws, whether in writing, or evidenced by the usage and customs of the conquered or ceded country, continue in force till altered by the new sovereign. (8 Wheat, 589, 12 Wheat, 528, 535; 6 Peters, 712; 7 Peters, 86, 87; 8 Peters, 444, 465; 9 Peters, 133, 734, 747, 748, 749; Cowp., 205, &c.; 2 Ves., Jun., 349; 10 Peters, 305, 330, 721, 732, &c.) This court has defined property to be any right, legal or equitable, inchoate, or perfect, which before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign, ‘with a trust,’ and make him a trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district, according to the principles of justice, and rules of equity. (6 Peters, 709, 714; 8 Peters, 450; 9 Peters, 133, 144, 137; 10 Peters, 105, 324, 331, 335, 336.) The same principle has been applied by this court to the right of a Spanish town, as a municipal corporation. (10 Peters, 718 to 736; passim, 144, 734, 736; 10 Peters 105, 324, 331, 335, 336; vide, also, 1 Ves., Sen., 453; 2 Bligh. P. C. N. S., 50, &c.)”



In *Leitensdorfer v. Webb* (1857), 20 Howard, 176, Mr. Justice Daniel, speaking for the court, said:

"This case is brought before the court upon a writ of error to the Supreme Court of the Territory of New Mexico.

"Upon the acquisition, in the year 1846, by the arms of the United States, of the Territory of New Mexico, the civil government of this Territory having been overthrown, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary government for the acquired country. By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to the change of sovereignty, would be the appointment or control of the agents by whom and the modes in which the government of the occupant should be administered—this result being indispensable, in order to secure those objects for which such a government is usually established.

"This is the principle of the law of nations, as expounded by the highest authorities. In the case of *The Fama*, in the 5 C. Rob., 106, Sir William Scott declares it to be 'the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed.' So, too, it is laid down by Vattel, book 3d, cap. 13, sec. 200, that 'the conqueror lays his hands on the possessions of the State, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters.' In the case of *The United States v. Percheman*, 7 Pet., pp. 86, 87, this court have said: 'It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed' Vide. also, the case of *Mitchell v. The United States*, 9th Ib. 711, and Kent's Com., Vol. I., p. 177."

This same principle was announced by Mr. Justice Swain in the case of *United States v. Moreno* (1863), 1 Wall. 400, 401, in delivering the opinion of the court as follows:

"California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the Treaty of Guadalupe Hidalgo. That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the Treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction of the law of nations. The Act of March 3d, 1851, was passed to assure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court, in the cases which may come before it, to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice."

Upon this general principle see also the cases of *Soulard's Heirs v. U. S.* (1836), 10 Pet. 100; *U. S. v. Segui* (1836), 10 Pet. 306; *Jones et al v. McMasters* (1857), 20 How. 8; *U. S. v. Chaves* (1895), 159 U.S. 452, 457; *Korn & Wisemiller v. Mutual Assurance Society etc.* (1810), 6 Cranch, 192.

That the doctrine thus applied by the Supreme Court of the United States in passing upon the rights of private persons in acquired territory does not depend upon the terms of a treaty but upon the general principles of international law was set forth by Mr. Justice Swain in *Dent v. Emmeger* (1871), 14 Wall. 308, where he said:

"Titles which were perfect before the cession of the Territory to the United States, continued so afterwards, and were in nowise affected by the change of sovereignty. *U. S. v. Roselius*, 15 How., 36. The Treaty so provided, and such would have been the effect of the principles of the law of nations if the Treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect pre-existing rights of private property. Perfect titles are as valid under the new government as they were under its predecessor. *Strother v. Lucas*, 12 Pet., 412."

That this principle thus announced in this case is not founded on a strict legal conception but that it has its sources in fundamental considerations of humanity was well stated by Mr. Chief

Justice Marshall in the case of *Johnson v. Graham's Lessee* (1823), 8 Wheat: 543,589, in which he made the following statements:

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers."

Moreover, it is clear that in adjudicating upon the rights of private citizens in territory taken over by a conqueror, a conqueror should not approach the matter in a narrow or technical spirit, as was clearly set forth by Mr. Justice Field, who delivered the opinion of the court in *United States v. Anguisola* (1863), 1 Wall. 352. Mr. Justice Field said:

"To these observations, so just and pertinent, we will only add that the United States have never sought by their legislation to evade the obligations devolved upon them by the Treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded Territory, or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the Treaty, the law of nations, the laws, usages and customs of the former governments, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property, which they claim, depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded."

Moreover, authority is not wanting to establish the proposition that not only must the conquering nation respect the private vested rights held by inhabitants of the conquered territory, but that the conquering nation is under obligation to pass the necessary laws to enforce and protect such rights should the existing law of the conquering state, now applied to the conquered nation, be found insufficient for this purpose.

Upon this point Mr. Dana in his notes to Wheaton's International Law makes the following comments (p. 434):

"IN CASE OF COMPLETED CONQUEST. Completed conquest supposes the conquering power to have become the permanently established sovereignty of the country. This may be either by a cession from the former sovereign, or by a practical acquiescence by him or by the people of the territory in its subjection to the conquering State, or by the entire extinction of the political existence of the conquered State.

"(1) *Private Property of Citizens.* When this change has taken place, it is to be observed that the relations of war give place to those of peace, and military authority to civil administration. There is no reason, therefore, why the State should confiscate the property of its new subjects any more than of its old subjects; for the fact, that they were formerly enemies, is not a crime or a penal offence. Nations now respect the obligation of a citizen or subject to sustain his own State in war, and he is treated by the opposite belligerent as a prisoner of war,—in other words, as a lawful belligerent, and not as a criminal. (This reasoning does not apply to enemies in a civil war which has its origin in rebellion; for that is, in law, a criminal offence.) It follows, therefore, that the private property of citizens is not considered as transferred by the completed conquest to the conquering State. It is a distinct question, how far the completed conquest affects acts of ownership done by the conquering State while in hostile military occupation. *Not only does the State, now become the sovereign, respect private rights and titles, but is bound to make laws and regulations to insure to individuals the means of exercising and enjoying their rights, appropriate to the new political system under which they have passed.*"

The same principle has been laid down by Halleck, Volume 2, Baker's edition, page 494, where that writer makes the following comments:

"§ 26. We are of opinion that the above rule of international law laid down by Chief Justice Marshall, and repeated in numerous decisions of the Supreme Court of the United States, is correct. It not unfrequently happens, however, that much injustice and inconvenience will result to the owners of property in a ceded or conquered territory, by the transfer of themselves and their property from one system of laws to another very different from the first, and wholly inadequate to afford remedies for a violation of the rights of property. And as the law of nations and the usage of the civilised world impose upon the new sovereignty the duty to maintain and protect the property of the conquered inhabitants, it is bound to take the necessary steps to clothe equities with a legal title, so as to bring them within the scope of legal remedies under its own laws. It is with this view that Congress has usually passed remedial Acts for the ascertainment and recognition of lands of private ownership in territories acquired by the United States. Although the maintenance of such property may be fully guaranteed by the law of nations and the stipulation of treaties, yet, in order to place it under the careful guardianship of our municipal laws, it is necessary to

invest it with a new attribute of a *legal* title, without which the owner may be unable either to maintain his own possession or eject an intruder. For example, a right or title to lands which, under Spanish or Mexican law, is abundantly sufficient for the security and protection of the owner in his rights, may be utterly useless for such purposes under our laws, as it neither secures him in the possession and enjoyment of his property, nor enables him to bring a suit to eject an aggressor. A refusal or neglect to pass the necessary remedial acts in such cases, so as to invest equities with such legal attributes as will place all private property, of whatsoever description, under the guardianship of our laws, would be a violation of the obligations imposed upon us by the law of nations and the usage of the civilised world. A delay in applying such remedies is often equivalent to a denial of justice, or a confiscation of private property, and is, therefore, a breach of public law and a violation of national faith."

### *Conclusion.*

It is submitted that the above discussion establishes that the conquering Government is under obligation to recognize and protect private landed property rights held by private individuals, particularly those held by alien neutrals in territory acquired by conquest; and, further, that where the laws of the conquering country are not sufficient to protect and enforce such private landed rights, it is the duty of the conquering country to pass the laws necessary to afford such protection; and, finally, that where the conquering country fails to perform its duties in either one of these respects it must answer in damages to the country of which the injured party is a national.

### POINT III.

THE GOVERNMENT OF THE UNITED STATES FOR AND IN BEHALF OF THE CLAIMANTS, AMERICAN CITIZENS, ABOVE NAMED, ALLEGES, CONTENDS, AND MAINTAINS THAT THE WHEELWRIGHT CONTRACT OF DECEMBER 24, 1876, RECOGNIZES AND IMPOSES AN OBLIGATION TO PAY 835,000 BOLIVIANOS WITH INTEREST AT THE RATE OF FIVE PER CENT FROM THE DATE OF THE CONTRACT UNTIL SAID SUM WAS DUE, WITH INTEREST THEREAFTER AT THE LEGAL RATE UPON SAID PRINCIPAL AND INTEREST; AND THAT THE GOVERNMENT OF CHILE IS LIABLE UNDER A DIRECT OBLIGATION, QUASI AND EXPRESS, FOR THE AMOUNT DUE TO THE CONCESSIONARIES UNDER THIS CONTRACT OF 1876, INCLUDING INTEREST AT THE RATE AND UPON THE AMOUNT INDICATED ABOVE, FOR THE FOLLOWING REASONS AND UNDER THE FOLLOWING SPECIFIC PROMISES AND UNDERTAKINGS:

#### *Sub-Point A.*

The Government of Chile is liable for such indebtedness because it deliberately and with knowledge appropriated the funds specifically set apart and appropriated to the payment of this obligation.

#### *Prefatory Summary.*

The discussion of this point will show that by the contract of December 26, 1876, which embodied the governmental decrees of December 23rd and 24th of the same year, there were set apart and appropriated to the payment of this obligation all of the proceeds of the customs of Arica beyond the sum of \$405,000 annually, which Bolivia was then receiving under the Peruvian-Bolivian treaty arrangement of 1875; that under the subsequent arrangement contemplated at the time the Wheelwright contract was made and subsequently consummated there would have accrued to Bolivia from the customs receipts of Arica sums sufficient to have discharged this debt as early as the middle of 1882; that ignoring the rights possessed by Wheelwright under the contract of 1876 and with a full knowledge that such rights were possessed, the Government of Chile appropriated to its own use the funds which, under this contract, would have gone to Wheelwright; that by this action the Government of Chile in reality took that which belonged to

Wheelwright; that under the well settled and uniformly recognized principles, not only of the common law but of the civil law as well, the Government of Chile appropriated money which *æquo et bono* belongs to the concessionaries under the Wheelwright contract; and that therefore an obligation arises upon the part of Chile to satisfy the debt due under the Wheelwright contract.

That the principles of the civil and the common law require that the Government of Chile shall restore the money thus appropriated by the decrees aforesaid to the payment of the Wheelwright contract, which money the Government of Chile tortiously conveyed to its own uses and which money, therefore, became *æquo et bono* due the concessionaries under the Wheelwright contract, is clearly evident from a consideration of the provisions of Book 3, Title 27, of the Institutes of Justinian; of the Commentaries upon quasi contracts in Sir Henry Maine's Ancient Law; of Sohme's Institutes of Roman Law; of the decision by Lord Mansfield in *Moses v. Macferlan*; of the Commentaries of William David Evans, Esq., upon Pothier's treatise on the Law of Obligations; of the same writer's learned essay upon "Action for Money Had and Received;" as well as of various decisions of the courts of the United States and Great Britain. The same responsibility is fixed upon the Government of Chile by writers upon international law and by the practice of nations.

#### *Discussion.*

Those portions of the contract of December 26, 1876, which are pertinent to the discussion of the present point read as follows:

*"Resolution of December 24, 1876.*

"MINISTRY OF FINANCE AND INDUSTRY,

*"La Paz, December 24, 1876.*

"In view of a proposition made by Mr. John Wheelwright, a member and representative of the firm of Alsop & Co., of Valparaíso, in liquidation, for the purpose of providing for the payment of its claims against the Government by an assignment of the rights which were acknowledged in favor of Pedro Lopez Gama, a new compromise has been concluded in a cabinet meeting with Mr. Wheelwright which finally terminates this matter. It is drawn up in the following terms:

"First. The sum of 835,000 bolivianos is acknowledged as due the aforesaid representative of the firm of Alsop & Co., together with interest at the rate of 5 per cent per annum, not addable to the principal, and to be reckoned from the date on which this contract is duly executed.

"Second. The said principal and interest shall be amortized by means of drafts all of which are to be drawn in quarterly installments on the surplus, which, from the date on which the present customs contract with Peru terminates, shall arise, from the quota due Bolivia in the collection of duties in the Northern custom house, over and above the 405,000 bolivianos which the Peruvian Government now pays,—whether the customs treaty with that Republic is renewed or whether the National custom house is reestablished.

\* \* \* \* \*

"Sixth. In all cases in which sums of money are paid or received, the Chilean peso or the Peruvian sol of coined silver shall be considered equivalent to the boliviano, either in this contract or in that regarding the mining concessions.

"Let the proper document be executed, inserting therein this compromise and the contract connected therewith which is mentioned above. Let this be recorded.

"[SEAL.] A true copy.

"JOSE SALINAS,<sup>a</sup>

"Chief Clerk of Foreign Relations."

It is believed to be unnecessary at this point again to discuss the question of the legality of this contract, which it is believed has been already sufficiently discussed under Point I, *supra*, and therefore it will be considered as established that the contract of December 26th, 1876, embodying the decrees of December 23 and 24 of the same year, was a valid, legal, and binding instrument, being properly negotiated and concluded by persons duly authorized thereto, and that the obligation to pay the principal and interest therein recognized as due and payable was complete and perfect.

As is evident from the decree of December 24, 1876, as above quoted, and as has been pointed out in the Historical Résumé of the case, the concessionaries in this case had the right and title to all of the Arica yearly custom receipts beyond \$405,000, and yet the Government of Chile, notwithstanding the interests thus held by the concessionaries, appropriated the entire custom receipts from the time they assumed control until the treaty of 1884 went into effect; and, further, notwithstanding such complete title so held by the concessionaries to these customs, not one cent was ever offered to them, or ever received by them, of the revenue which came from this custom house.

As has been already set forth (see Point I, Sub-Point C, C<sup>4</sup>), the duly accredited representatives of the Governments of Bolivia and Chile drew up and signed at Santiago in April, 1884, a so-called Pact of Truce. Among the provisions of this Pact of Truce

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<sup>a</sup> I Appendix, p. 8.



were certain ones which provided for the settlement of claims existing against the Government of Bolivia and which were incorporated in Articles 3 and 6 of the treaty, which read as follows:

"Third: The properties sequestered in Bolivia from Chilian citizens by decrees of the Government, or by measures emanating from civil and military authorities, shall be immediately returned to their owners or to the representatives constituted by them, with sufficient powers.

"The product which the Government of Bolivia may have received from said properties, and which may be proved by documents relating thereto, shall likewise be returned.

"The losses which may have been suffered by Chilian citizens through the causes mentioned, or by the destruction of their properties, shall be indemnified in virtue of the demands which the interested parties shall bring before the Government of Bolivia.

"Sixth. In the port of Arica the import duties on foreign goods destined for consumption in Bolivia shall be recovered in conformity with the Chilian tariff, and these goods shall not be subject to the imposition of any other duty in the interior. The returns of that Custom House shall be divided in this manner: Twenty-five per cent shall be applied to the service of the Custom House and to the part which corresponds to Chili for the despatch of the merchandise for consumption in the territories of Tacna and Arica, and seventy-five per cent for Bolivia. This seventy-five per cent shall be divided, for the present, in the following manner: Forty parts shall be retained by the Chilian Administration for the payment of the sums which may result as owing by Bolivia in the settlement which may take place, according to the third clause of this pact, and to cover the unpaid part of the Bolivian Loan raised in Chili in 1867, and the balance shall be delivered to the Bolivian Government in currency or in drafts to its order. In the settlement and payment of the loan, it shall be considered on equal terms with the claimants for damages in the war.

"The Bolivian Government, at its convenience, can inspect, by means of its Customs' Agents, the accounts of the Arica Custom House.

"When the indemnities referred to in the third article have been paid, and the retention of the aforesaid fortieth part shall, on this account, have ceased, Bolivia can establish her interior Custom Houses in the part of her territory which she may deem convenient. In this case foreign merchandise shall have free transit through Arica."<sup>a</sup>

Before considering the exact nature of the provisions contained in the above quoted Articles 1 and 2 of the decree of December 24, 1876, it might be well to direct attention in a general way to the fact that nations not infrequently set aside—"hypothecate," as the arrangement is sometimes designated—a portion of their customs receipts for the payment of their national obligations and it would seem to be unnecessary to go into any extended discussion

to establish the propriety and legality of such a procedure, since this manner of liquidating national debts is so well known and universally recognized. However, among the more noted of the recent arrangements of this sort which have been made by various governments for the liquidation of their debts by the application thereto of their customs receipts may be mentioned the liquidation by Venezuela, under the decision of the Hague Tribunal of 1904, of the debts due from her, first, to the preferred powers and, secondly, the debts due to the non-preferred powers; also the liquidation of the foreign debt of Liberia by the customs revenue of that Government, which is being appropriated in certain proportions to the payment of her English loan, the customs service being administered by representatives of the Government of Great Britain; and more recently the liquidation of its foreign debt by the Government of the Dominican Republic through a formal treaty drawn and negotiated for that purpose by which it binds itself, pursuant to a liberal and far-reaching scheme of liquidation, to appropriate a certain proportion of its customs receipts to the liquidation of debts due from it to the nationals of the powers. To this there may well be added the Pact of Truce, just quoted, by which the Government of Chile stipulated for and secured the greater part of the Bolivian customs receipts collected at the port of Arica—an arrangement which was perpetuated by various protocols and treaties for twenty years. See also the provisions of the supplemental protocol of May 28, 1895.

Thus, it is clear that an arrangement of this sort is not unusual, is recognized as equitable, and is always a proper, valid, and binding arrangement for the purpose of discharging just obligations. Indeed, for that matter, the representatives of Chile have in their general correspondence with the Government of Bolivia, and aside from the Pact of 1884, expressly recognized, not only the propriety but the possible necessity of making arrangements of this sort for the settlement of national debts. For example, Señor König, the Minister of Chile at La Paz, in his letter to the Bolivian Foreign Office under date of August 13, 1900, assured the Government of Bolivia that—

“Should Bolivia later on intend to contract a loan in Europe, giving as a guarantee her custom revenues, it would not certainly be an obstacle to this operation the fact that the custom receipts

of Bolivia set aside for the payment of said loan are collected at a Chilean port, because, happily, the credit of my country enjoys generally in the world a solid and well-merited reputation."<sup>a</sup>

Moreover, the arrangements for the liquidation of debts due from Bolivia to Chilean citizens, as set forth and embodied in the treaties between Chile and Bolivia of 1866 and 1874, as well as the arrangement made in the Pact of Truce just quoted, are convincing evidence that the Government of Chile recognizes the propriety and validity of this sort of arrangement for the settlement of national debts.

In view of this universally recognized practice it is believed to be unnecessary further to indicate or illustrate the power possessed by a sovereign nation either to pledge or to appropriate its customs receipts to the payment of its just obligations, nor is it necessary to comment upon the propriety of such an act from the standpoint either of the debtor or of the creditor nation, since the principle is thus so well established and so recently and fully recognized.

It should, however, be observed, in the first instance that the provisions of the decree of December 24, 1876, do not constitute in any proper sense, as to any part of the customs receipts of Bolivia, a real and technical pledging or hypothecation as is clearly apparent from an examination of the fundamental principles underlying the law of pledges and hypothecations. It is elemental that in a mortgage, a pledge, or an hypothecation there exists, first, a debt, and, secondly, a *security* for the debt, and, save in rare instances and unusual circumstances the *security*—that is, the thing pledged, mortgaged, or hypothecated—is never taken to satisfy the debt, unless and until the debt upon maturity is not paid and the thing so mortgaged, pledged, or hypothecated is sold and the proceeds of the sale applied to satisfy the indebtedness. Strictly speaking, therefore, hypothecating is a giving of security and the thing hypothecated does not and is not used to pay the debt, but stands as a mere security, the payment of the debt being obtained from other sources.

It is perfectly obvious from even a casual reading of Article 2 of the decree of December 24, 1876, that the customs receipts specified in that article are not pledged, mortgaged, or hypothecated in this sense. They are not in any sense a security for the payment of the debt recognized as due by the Wheelwright contract, but they are, on the contrary, the source—the very fund—from and by which the debt is to be paid. This Decree of Decem-

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<sup>a</sup> II Appendix, p. 478.

ber 24, 1876 purports and does definitely and specifically appropriate to the payment of this debt all beyond a certain definitely and precisely fixed sum which may be collected in certain of the Bolivian Customs Houses; it is an actual appropriation of money, and not merely a pledging or hypothecating of customs receipts as security, by and through a contract which was negotiated and concluded by the Executive of the Government of Bolivia and ratified by the Bolivian Congress. This constitutes the strongest and clearest kind of an analogy to an ordinary appropriation bill recommended by an executive to the legislature, the bill being later passed by the legislature, thus constituting an appropriation of the funds so voted.

To put it finally, it seems incontrovertible that this contract made by the Executive and approved by the Bolivian Congress constitutes an absolute assignment of so much of the customs receipts of the Republic as is covered by the contract and is closely analogous, therefore, to a sale of so much of the national property.

In view of what was said above regarding the custom of nations with reference to the application of customs revenue to the liquidation of national obligations, it seems obvious that a sovereign nation must be held to have the power to make an arrangement of the kind incorporated in the Wheelwright contract of December 26, 1876, and that such arrangement when so made has all of the sanctity that must be accorded to sovereign acts, and it is believed therefore to be unnecessary to enter into any extended argument to establish this point.

It is, however, not without interest to note that we have in the private law of both countries an exact legal counterpart of the principles involved in this transaction. Under the familiar principle that you may mortgage anything which you may assign or sell, and, reciprocally, anything that you may assign or sell you may mortgage, it appears clearly evident that the courts of both England and the United States have fully recognized as a legal and binding principle of law and equity the right of private parties to make between themselves a binding agreement under circumstances that can not in principle be distinguished from the present, save in the fact that in the present case the subject matter of the transaction was the national customs and that one of the parties to the agreement was a sovereign power.

See *Holroyd v. Marshall*, 10 H. of L., 191; *Coombe v. Carter*, 36 Ch. D., 348; and *Tailby v. The Official Receiver* (1888), 13 H.

of L. and P. C. App., 523, in which the House of Lords distinctly held that a merchant had the right to mortgage (and therefore it must be, under the principle above announced, the right to sell or assign) his future book accounts, not yet accrued.

The principle underlying this determination has been repeatedly recognized by the various courts of the United States, and the specific doctrine announced in *Tailby v. The Official Receiver* has been affirmed in the courts of the United States.

It would therefore seem that so far as the law of England and the United States is concerned, the transaction between the Government of Bolivia and Wheelwright would have been a legal and binding transaction, if it had been between private individuals in the United States; and if a private individual might under English and American law make a valid assignment of future book accounts, why may not a sovereign under the same fundamental doctrines make a valid assignment of future customs receipts, if it be assumed (what may not indeed be the fact) that in such matters the sovereign is subject to the same legal principles which bind and control the transactions of the subject.

It appears, moreover, to be held equally that, under the general principles of the Roman law, the foundation of the civil law, this transaction would likewise constitute as between private parties a valid and binding agreement. Moyle, in his *Institutes of Justinian*, Excursus II, p. 318, expounds the law upon this question in the following words:

"Hypotheca possessed great advantages over the earlier forms of pledge, of which fiducia was quite obsolete in the time of Justinian. The pledgor was never deprived of the use and possession of his property, and yet the creditor was absolutely secured. *The class of pledgable objects was largely augmented: money could now be lent on the security of things not yet in existence, e. g. future crops and expectations ('et qua nondum sunt, futura tamen sunt, hypothecae dari possunt, ut fructus pendentes, partus ancillae, fetus pecorum' Dig. 20. 1. 15), or of mere incorporeal rights, real and personal (Dig. ib. 9. 1; ib. 11. 2; Dig. 13. 7. 18. pr.).*"

From this discussion, it seems sufficiently established that there is in the transaction of 1876 between the Government of Bolivia and John Wheelwright nothing which is hostile, not only to the spirit, but even to the letter of the principles of law governing the transactions of private individuals of the two countries, and no reason is perceived for contending that (subject to special constitutional limitations, which do not appear in this case) what the citizen or subject may do under the general laws of a country may not also be done by the sovereign.

To recapitulate, it should be observed that under the first and second articles of the decree of December 24, 1876, as has been already pointed out, the customs receipts as specified in this article are not pledged, mortgaged, or hypothecated. They are not in any sense a security for the payment of the debt recognized as due by the Wheelwright contract, but they are, on the contrary, the source—the very fund—from and by which the debt is to be paid. Further, this decree of December 24, 1876, purports to appropriate and does definitely and specifically appropriate to the payment of this debt all beyond a certain definitely and precisely fixed amount which might be collected in certain of the Bolivian Customs Houses; it is not, therefore, merely a pledging or hypothecating of the customs receipts as security, but is an actual appropriation of money by and under an instrument negotiated and concluded by the Executive of the Government of Bolivia and ratified by the Bolivian Congress. In other words, you have, as stated above, the strongest and clearest kind of an analogy in this case between the recommendation of an appropriation bill by an executive to the legislature and the passing by the legislature of the bill so recommended, thus constituting an appropriation of the funds so voted.

It would appear therefore that whenever the Bolivian customs receipts collected at the Port of Arica were in excess of 405,000 bolivianos annually, the excess thereof belonged, under the contract of 1876, absolutely and unconditionally to John Wheelwright. He had under his contract nothing to do in order to receive such excess except to draw the proper drafts. In other words, the money so collected by the Bolivian Government belonged, under this contract, not to that Government but to Mr. Wheelwright.

That the money which should come in from the Bolivian customs at Arica were not subject to the free disposition of the Government of Bolivia, and moreover that they were not subject to the free and unhampered disposition, even of the Government of Chile under her compact of truce of 1884, was clearly recognized by the Government of Chile itself in the Matta-Reyes Protocol of 1891, as is evident from the following quotation:

“(2) The Government of Chile will take charge of and assume the payment of the obligations recognized by that of Bolivia in favor of the mineral enterprises of Huanchaca, Corcoro and Oruro, deducting the amounts in accordance with the compact of truce, *as well as the credits which encumbered the income from the Littoral by reason thereof and which are* that of the Garantizador de Valores, Bank of Chile, the bonds issued for the construction of the railroad of Mejillones, the

*credit acknowledged in favor of Lopez Gama, representing the house of Alsop & Company of Valparaiso, and that of 40,000 Bolivianos in favor of the Garday family; the products of the custom houses of Arica and Antofagasta in consequence remaining free of all encumbrances on importations for Bolivia."*<sup>a</sup>

If this relationship between the customs receipts and these obligations be that which is recognized by this protocol, it seems entirely obvious that any person who should by force in whatever way exerted, or by whatever form manifested, take from Mr. Wheelwright the money thus belonging to him, became thereby guilty of a wrong which in equity and good conscience, *æquo et bono*, rendered him liable to Mr. Wheelwright for the money thus improperly appropriated.

This principle is founded upon certain fundamental rules of justice which are operative in both the civil and the common law, and which have been developed with singular completeness in an unbroken line of decisions, dating, in the English law at least, from the time of Mansfield.

The obligation imposed by law upon him who improperly appropriates the money or property of another is known both to the civil and the common law as "quasi-contractual." The nature of this obligation will for the present purpose be sufficiently recalled by the following excerpts from text-writers and decisions.

The nature of a quasi-obligation is set forth in book 3, title 27, of the Institutes of Justinian (Moyle's translation) as follows:

"TITLE XXVII.—*Of Quasi-Contractual Obligations.*

"Having enumerated the different kinds of contracts, let us now examine those obligations also which do not originate, properly speaking, in contract, but which, as they do not arise from a delict, seem to be quasi-contractual. Thus, if one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under a legal obligation even though he knows nothing of what has taken place. The reason of this is to the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be

<sup>a</sup> II Appendix, pp. 372-373.

likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better. Guardians, again, who can be sued by the action on guardianship, cannot properly be said to be bound by contract, for their is no contract between guardian and ward: but their obligation as it certainly does not originate in delict, may be said to be quasi-contractual. In this case too each party has a remedy against the other; not only can the ward sue the guardian directly on the guardianship, but the guardian can also sue the ward by the contrary action of the same name, if he has either incurred any outlay in managing the ward's property, or bound himself on his behalf, or pledged his own property as security for the ward's creditors. Again, where persons own property jointly without being partners, by having, for instance, a joint bequest or gift made to them, and one of them is liable to be sued by the other in a partition suit because he alone has taken its fruits, or because the plaintiff has laid out money on it in necessary expenses: here the defendant cannot properly be said to be bound by contract, for there has been no contract made between the parties; but as his obligation is not based on delict, it may be said to be quasi-contractual. The case is exactly the same between joint heirs, one of whom is liable to be sued by the other on one of these grounds in an action for partition of the inheritance. So too the obligation of an heir to discharge legacies cannot properly be called contractual, for it cannot be said that the legatee has contracted at all with either the heir or the testator; yet, as the heir is not bound by a delict, his obligation would seem to be quasi-contractual. Again, a person to whom money not owed is paid by mistake is thereby laid under a quasi-contractual obligation; an obligation, indeed, which is so far from being contractual, that, logically, it may be said to arise from the extinction rather than from the formation of a contract; for when a man pays over money, intending thereby to discharge a debt, his purpose is clearly to loose a bond by which he is already bound, not to bind himself by a fresh one. Still, the person to whom money is thus paid is laid under an obligation exactly as if he has taken a loan for consumption, and therefore he is liable to a condition. Under certain circumstances money which is not owed, and which is paid by mistake, is not recoverable; the rule of the older lawyers on this point being that wherever a defendant's denial of his obligation is punished by duplication of the damages to be recovered—as in actions under the *lex Aquilia*, and for the recovery of a legacy—he cannot get the money back on this plea. The older lawyers however applied this rule only to such legacies of specific sums or objects as were given by condemnation: but by our constitution, by which we have assimilated legacies and trust bequests, we have made this duplication of damages on denial an incident of all actions for their recovery, provided the legatee or beneficiary is a church, or other holy place honoured for its devotion



to religion and piety. Such legacies, although paid when not due, cannot be reclaimed." (Imperatoris Justiniani Institutiones, Moyle translation, Vol. II, p. 155)

Sir Henry Summer Maine, in his "Ancient Law," makes the following general remarks upon the subject of "Quasi-Contracts":

"The part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of obligation, or, what comes nearly to the same thing, of Contract and Delict. The Romans themselves were not unaware of the offices which the copious and malleable terminology belonging to this part of their system might be made to discharge, and this is proved by their employment of the peculiar adjunct *quasi* in such expressions as Quasi-Contract and Quasi-Delict. 'Quasi,' so used, is exclusively a term of classification. It has been usual with English critics to identify the quasi-contracts with *implied* contracts, but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolised, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a Quasi-Contract is not a contract at all. The commonest sample of the class is the relations subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract, inasmuch as the Convention, the most essential ingredient of Contract, is wanting. This word 'quasi,' prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as the sequel to the other, and that the phraseology taken from the one department of law may be transferred to the other, and employed without violent straining in the statement of rules which would otherwise be imperfectly expressed." (Maine's Ancient Law, by Pollock, p. 332, 333.)

Sohme, in his "Institutes of Roman" Law (translation by Ledlie), states the principles which underlie quasi-contracts in the following language (p. 315):

"Where the facts of a case merely resemble a contract, but nevertheless produce the same effect as a contract, we have a Quasi-Contract. The following are examples of quasi-contracts:

"1. Enrichment sine causa and ex injusta causa.

"Where A is enriched at the expense of B under circumstances which are either not sanctioned by, or are even opposed to, the policy of the law, we have, in the first case, an enrichment *sine*

*causa*, in the second case, an enrichment *ex injusta causa*. The person who is enriched under such circumstances (A) is under an obligation to restore the amount by which he was enriched. The person at whose expense A was enriched can proceed against A by *condictio*."

Perhaps the leading English case upon this question is that of *Moses v. Macferlan* (2 Burrow's, 1005, 1012), decided by Lord Mansfield in 1760. Without quoting the entire opinion, it will perhaps be sufficient to note one of the final paragraphs, in which the general principles are lucidly and succinctly set forth in the following language:

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is *very beneficial*, and therefore *much encouraged*. It lies *only* for money which, *ex æquo et bono*, the defendant *ought* to refund; it does *not lie* for money paid by the plaintiff, which is claimed of him as *payable in point of honour and honesty*, although it *could not have been recovered* from him by any course of law; as in payment of a debt barred by the *statute of limitations* or *contracted during his infancy*, or to the extent of principal and legal interest upon an *usurious contract*, or, for money *fairly lost at play*; because in all these cases, the defendant may *retain it with a safe conscience*, though by *positive law* he was barred from recovering. But it *lies* for money paid by *mistake*; or upon a consideration which happens to *fail*; or for money got through *imposition*, (express or implied) or *extortion*, or *oppression*; or an *undue advantage* taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

"In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity* to *refund* the money."

That Lord Mansfield, in thus laying down the law which in this case he was enforcing, was turning for his source to the civil law, with which, as a Scottish lawyer, he was thoroughly familiar, has been conclusively demonstrated by William David Evans, esq., in his valuable notes to Pothier's *Treatise on the Law of Obligations or Contracts*. (Vol. 2, p. 378, 380.) Mr. Evans says:

"But if there is any subject to which the doctrine of an universality of principle peculiarly applies, it is that of reclaiming money unduly paid; not only upon the ground that there is no subject in its nature, more wholly referrible to the general rules of natural justice, as distinct from the laws founded upon local habit or municipal institution, but also upon the more favourite ground of precedent itself. It will be generally agreed that the system of law upon this subject, as administered in *England*, is chiefly to be deduced from the determinations of Lord Mansfield, and that the few cases respecting it of an earlier date are not of sufficient importance to form any regular system. But Lord Mansfield's own views upon the subject are peculiarly referrible to the principles of universal jurisprudence, as illustrated and embodied in the *Roman law*, and

the whole series of his conduct respecting it is a continued precedent of his recurrence to those principles. In the leading case of *Moses v. Macfarlane* [*Macferlan*], in which he embraced the earliest opportunity that occurred to him, of giving an exposition of the grounds and nature of the action for money had and received, he enters diffusely into the general doctrine respecting it, and states several principles which have ever since been looked up to as the standard of authority (even by those who think that in the particular application of these principles, he did not allow sufficient consequence to others by which they ought properly to have been restricted and controlled). But it will scarcely be contended that he found the materials of his exposition in any preceding volume of *Reports*; whereas a very slight comparison will evince the source of it to have been the juridical wisdom of ancient *Rome*.

"This kind of equitable action to recover money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It is only for money which, ex æquo et bono, the defendant ought to refund.

"It does not lie for money paid by the plaintiff, which is demanded of him as payable in point of honour and honesty, though it could not have been recovered from him by any course of law.

"As in payment of a debt, barred by the statute of limitations.

"Or contracted during his infancy.

"Haec conditio ex bono et æquo introducta, quod alterius apud alterum sine causa deprehenditur, revocari consuevit. 1. 66. ss. Lib. 12. Tit. 6 de Cond. Indeb.

"Naturales obligationes non eo solo aestimantur, si actio aliqua earum nomine competit: verumetiam eo si soluta pecunia repeti non possit. ss. Lib. 44. Tit. 7. de Obliget Actio. 1. 10. Lib. 46. Tit. 1. de fide jussoribus, 1. 16. § 3.

"Naturaliter etiam servus obligatur, et ideo si quis ejus nomine solvat, vel ipse manumissus ex peculio, repeti non poterit. 1. 13. de Conditione Indebiti. ss. 12. Tit. 6.

"Naturale autem debitum in hac causa pro vero debito habetur, eoque etsi exigi non potest; solutum tamen non repetitur. Vinnius. Ad. Inst. Lib. 3 Tit. 28. 4. 6.

"Julianus verum debitorem post litem contestatam, manete adhuc judicio, negabat solvemtatem repetere posse: quia nec absolutus, nec condemnatus repetere posset, licet enim absolutus sit, natura tamen debitor *permanent*. 1. 60. de Cond. Indeb.

"Huc item plerique reserunt exceptionem Senatus Consulti Macedoniani; nam et filius familias si mutuam pecuniam acceperit, et pater familias perperam

“It lies for money paid by mistake.

“Or upon a consideration which happens to fail.

“Or for money got by imposition, express or implied, or extortion, or oppression.

“Or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons, under these circumstances.

“In one word the gist of this action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.

“The damages recovered in the case of *Dutch v. Warren*, shew the liberality of this kind of action; for though the defendant received considerably more, yet the difference only was retained against conscience, and therefore the plaintiff ex æquo et bono could recover no more,

solverit, non repetit. Vinnius. Quoniam, naturalis obligatio manet. ss. Lib. 14. Tit. 6 de Sect. Maced. 1. 9. 10.

“Quod indebitum per errorem solvitur, aut ipsum aut tantumdem repetitur, 1, 7. de Cond. Indeb.

“Is cui quis per errorem non debitum solvit, quasi ex contractu debere videtur. Inst. Lib. 3. Tit. 28.

“The whole title in the digest de *Condictione Causa data, Causa, non secuta*, is an amplified view of this proposition.

“Si quis dolo malo aliquem induxerit, aut metu illato coegerit, ut promitteret non possum adduci ut credam, solutum ex his causis retineri posse. Vinnius.

“Ex ea stipulatione, quae per vim extorta esset, si exacta esset pecunia, repetitionem esse constat. ss. Lib. 12. Tit. 5. de Cond. ob Turp. vel. Injust. Caus. 1. 7.

“Si naturalis obligatio jure civili improbata sit, aut destituta juris civilis auxilio, qualis est mulieris intercedentis. 1. 16. § 1. ad Sect. Maced. prodigi promittentes, 1. 6. de Verb. Oblig. pupilli sine tutoris contractu, licet haec admittunt accessiones ea non attendentur et perinde repetitio datur, ac si quod ex causa solutum est nullo jure debitum esset, Vinnius, 22.

“Hoc natura aequum est neminem cum alterius detrimento, sieri locupletiozem. 1. 14. de Cond. Indeb.

agreeably to the rule of the Roman law: Quod conditio in-

debiti non datur ultra quam locupletior est factus qui accepit."

The same learned author, William David Evans, esq., in the introduction to his critical essay upon the "Action for Money Had and Received," lays down the fundamental principles underlying quasi-contractual obligations in the following careful and well considered language:

"If one person receives a sum of money for the purpose of paying it over to another, his obligation to make such payment is too plain to require any comment. The general obligation to refund money, which has been paid under a mistake, or obtained by fraud or extortion, or given for a purpose to which it has not been applied, is equally evident. According to the Roman law, actions of different denominations were adapted to the several cases, in which such payment was unduly made. The English law has adopted a general supposition, that the money which ought to be refunded was received for the use of the party by whom it was paid, and that the person receiving it made a promise to pay it on request. And the action used for this purpose is called AN ACTION FOR MONEY HAD AND RECEIVED. This action has also an extensive latitude as a mode of trying adverse rights; for if a person sells my property under a claim of title or otherwise, I may in point of form consider him as my agent and charge him with having received the money for my use and made a promise to pay. I have no intention at present of examining the different cases in which this is the proper form of action, where it is agreed that a right of action in some shape certainly exists. I shall only observe, that the extension of it has of late years been considerably favoured, and a party may now obtain redress upon this general allegation, in many cases where it was formerly deemed necessary to make a particular and circumstantial statement of his demand, whereby the danger of failing from an error in the statement was considerably increased: and in the case where a person has his election to bring his action, as for a wrong, or, waiving the injury, to consider the conversion of his property as an agency, and an obligation to account, he must act consistently throughout, and not treat the same act as licit for one purpose, and tortious for another. If I charge a man with converting my corn or timber to his own use, and sue him for damages, it will be no justification that I owe him a sum of money; but if I proceed against him in an action for money had and received, in order to recover the produce, he may set off his debt, and I cannot oppose the argument that his being my creditor does not warrant his taking and disposing of my property. Where death or bankruptcy has taken place, the choice between these two remedies is often very important.

"The present essay will be chiefly confined to the action for money had and received, as enforcing an obligation to refund money which ought not to be retained. The Roman system of jurisprudence ranked this as a Quasi contract, being an intermediate order between

contracts properly so called, which were founded upon actual consent, and wilful wrongs. And without particularising their technical distinctions, I shall, in referring to that law, in general consider the term *Solutio indebiti*, as comprising the general distinctions arising from a liability to refund.

"This obligation was enforced according to the general principles of natural equity, the foundation of it being a retention by one man of the property which he had unduly received from another, or received for a purpose, the failure of which rendered it improper that he should retain it. The mere legal liability to the original payment was not the question in consideration, but the injustice of permitting the money or other property, under all the circumstances, to be retained. The introduction of the action for money had and received into the English courts, is not novel, and several cases had occurred previous to the appointment of Lord Mansfield, in which it had been properly applied, so that it was familiar in point of practice. But it was reserved to that eminent judge to trace the nature and principles of the action, with a most instructive perspicuity, and to direct the general application of it in its proper channel.

"In some instances the particular decisions may be reasonably questioned, but the utility resulting from his general discussions must be universally allowed. In the case of *Moses v. Macferlan*, 2 Burr. 1005, which gave him the first opportunity of expressing his opinion, upon this ground of action, he very compendiously stated the nature and principles of it, coinciding in effect with the institutes of the civil law. The following extract from his opinion, will furnish a proper introduction to a more minute examination of the subject:— 'This kind of equitable action to recover money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money, which *EX ÆQUO ET BONO*, the defendant ought to refund, it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got by imposition, (express or implied) or extortion or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under these circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.'

"The maxim of the civil law, that it is naturally just that one man shall not be enriched to the detriment of another, *HOC NATURA ÆQUUM EST, NEMINEM CUM ALTERIUS DETRIMENTO FIERI LOCUPLETIOREM*, is particularly applied to the claim which we are at present examining.

"The Commentary of Vinnius upon the title in the institutes, *DE SOLUTIONE INDEBITI*, contains a very instructive view of the subject. His general exposition of it, which agrees in substance with the pre-

ceding observations of Lord Mansfield, is as follows:—In order to induce an obligation in favour of the person paying, and a right to reclaim what has been paid, two things are required. That what is paid should not be due; that it should be paid through error. In respect of the first; there is no repetition of what is really due: and nobody can suppose that there is a right of repetition if what was paid was due both in point of law and of natural justice. But supposing it only due according to one of these: If it is only by strictness of law, without any obligation in point of equity, and could be repelled by a perpetual exception, the right of repetition is allowed; as such a sum cannot be said to be due except in name. But what is due according to natural justice is considered as being really due: and although the payment of it could not be enforced, yet if it is actually paid though by a person who supposes himself to be liable in point of law, it cannot be reclaimed. If a debtor has a perpetual exception, but which is founded upon some reason that does not remove his natural obligation, and not being apprized of it, pays the debt, he has no claim to repetition. Such is the exception of a judgment in his favour, as the sentence of the judge cannot destroy the obligation founded on the consent of the party, and therefore it was decided, that a person really indebted, but liberated by a judgment in his favour, could not insist upon a repetition. Also, if a person under the power of his father, borrowed money, from the payment of which he was protected by the *SENATUS CONSULTUM MACEDONIANUM*, and after he became his own master (*PATER FAMILIAS*) paid the money, he was bound, as there was a natural obligation subsisting.”

The same principles which were laid down by Lord Mansfield in *Moses v. Macferlan* have been repeatedly voiced and applied by the American courts, one of the clearest statements of the principles being that made by Danforth, J., in *The People ex rel. Dusenbury v. Speir* (1879), 77 N. Y. 144, 150, in which that learned Judge stated the principle as follows:

“There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. (Addison on Contracts, 22.) And a somewhat similar distinction is recognized in the civil law, where it is said: ‘In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity produces the obligation by rendering obligatory the *fact* from which it results. Therefore these facts are called *quasi*

contracts, because without being contracts, they produce obligations in the same manner as actual contracts.' (1 Pothier on Obligations, 113.) And again at common law says *Blackstone*, (Vol. 3, page 165): 'If any one cheats me with false cards, or dice, or by false weights or measures, or by selling me one commodity for another, an action on the case lies against him for damages upon the contract which the law implies, that every transaction is fair and honest.' So if money is stolen, its owner may sue the thief for conversion; doubtless he may sue him for money had and received to his use, but in either of these cases could it be claimed that the wrongdoer was within the protection of the act passed to abolish imprisonment for debt, or that the contract implied by law was the contract specified in the first section of that act? Surely not. And to that class the present case belongs. The court below expressly puts the obligation upon the mere authority of the law, and makes a contract 'by force of natural equity.' The learned judge says: 'The law implied a promise to pay over, as the judgment directed that to be done.' So obligations are created in consequence of frauds or negligence, and in either case the law compels reparation, and permits the tort to be waived, but there is no contract. That can only come from a convention, or agreement of two, not by the option, or at the election of one. In the case before us there is not even an election, for the complaint states no contract, nor charges any *assumpsit*."

In view of the principles laid down in the excerpts above given, it cannot be successfully controverted that since the Government of Chile seized and appropriated to its own use that which belonged (under a contract recognized by all parties concerned as legal and binding) to John Wheelwright, the Government of Chile has become possessed of that which in equity and good conscience it may not retain, and which, under the universal principle of jurisprudence above set forth, must be returned to its proper and legitimate owner.

It is moreover under this principle immaterial that the thing improperly and wrongfully taken by the Government of Chile was money rather than property of other kinds, since there can be no question but that one who tortiously takes from another money belonging to the other, is, under the principles announced, liable in equity and good conscience for its return. On this precise point Judge Wm. A. Keener, who has written what is doubtless the ablest English treatise upon the subject of "*Quasi-Contracts*," makes the following observation, which he supports by ample authority:

"Since one has a right to recover the proceeds of property wrongfully converted and sold, it necessarily follows that where the plaintiff's *money* has been tortiously obtained by the defendant, the



tort may be waived and an action for money had and received be brought.

"In *Neate v. Harding*, the Defendants entered the house of the plaintiff's mother and wrongfully took money belonging to the plaintiff. This money they deposited in a bank to their joint account. The plaintiff was allowed to recover against them in a count for money had and received."

The principle controlling in such cases was well stated by Lord Mansfield in *Clark v. Shee* (1774) 1 Cowper, 197, 193 in which, speaking as to the action of money had and received, brought to recover money lost in a lottery, Lord Mansfield said:

"This is a liberal action, in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject-matter of it, the plaintiff may well support this action."

In the course of the court's opinion in *Neate v. Harding* (6 Ex. 349), cited by Judge Keener, the following opinions were given:

"Pollock, C. B.—We all agree that there ought to be no rule. The owner of property wrongfully taken has a right to follow it, and, subject to a change by sale in market overt, treat it as his own, and adopt any act done to it. That doctrine was carried to a great extent in *Taylor v. Plumer*, 3 M. & Sel. 562, and is fully explained by Lord Ellenborough in delivering the judgment of the Court. In this case *the money* taken belonged to the plaintiff; and it did not cease to be his money because it was in the defendants' hands; he was therefore at liberty to waive the wrongful act, and treat it as money received by the defendants for his use. The mere presence of the defendant Bowns might not have sufficed to render him liable; but there is evidence that he concurred in placing the money in the bank in the joint names."

"Parke, B.—I am also of opinion that there ought to be no rule. The plaintiff was bound to prove a joint act by both defendants, and under such circumstances as entitled him to maintain an action for money had and received. All difficulty on the first part of the case was obviated by showing that the money was paid into the bank on the joint account. It then became the same as if one individual alone had placed it there; and in my opinion it was competent for the plaintiff either to bring trover or trespass for taking the particular coin, or to waive the tort and sue for money had and received. I arrive at that conclusion by the same process of reasoning as in the cases cited; because it is admitted that, if a person wrongfully takes the goods of another and converts them into money, the latter has a right to recover the proceeds in an action for money had and received. That doctrine is explained in *Lamine v. Dorrell*, by Dowell, J, who says, 'that the plaintiff may dispense with the wrong, and suppose the sale made by his consent.' We need not go so far in the present case; all that is necessary is, that the plaintiff should have a right to waive the wrongful act; then the defendants having got the money of the plaintiff in their hands, must pay it back to him again."

This same principle has been the subject of repeated determination by the American Courts. In the case of *Cory v. Freeholders of Somerset*, 47 N. J. L., p. 182, 186, Dixon, J., discussed the principles as follows:

"The first question raised by the assignment of errors in this cause is *whether money fraudulently obtained by the defendant below from the plaintiff can be recovered on the common count for money had and received*, which does not set out the particulars of the fraud.

"This may be answered by extracts from the opinion of the King's Bench, delivered by Lord Mansfield in *Moses v. Macferlan*, 2 Burr. 1005; 'If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action (on the case, for money had and received to the plaintiff's use,) founded in the equity of the plaintiff's case, as it were, upon a contract. \* \* \* One great benefit which arises to suitors from the nature of this action is that the plaintiff need not state the special circumstances from which he concluded "that, *ex æquo et bono*, the money received by the defendant ought to be deemed as belonging to him." He may declare generally "that the money was received to his use," and make out his case at the trial \* \* \* This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. \* \* \* It lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation contrary to laws made for the protection of persons under those circumstances. \* \* \* In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity, to refund the money.'

"The plaintiff's declaration is properly framed to sustain its claim."

The federal courts have had the same principle in mind in similar cases. For example, in the *Northwestern Mutual Life Insurance Co. v. Elliott*, 5 Federal Reporter, 225, 229, Deady, D. J., commented upon the principle as follows:

"But it is a mistake to suppose this suit is brought upon a contract actually made or attempted to be made by the parties, and within the purview or operation of the prohibition of the statute, or at all. On the contrary, *it is a suit brought to recover money obtained by the defendant from the plaintiff*, not upon the void contract of insurance, but the fraud of the defendant. True, the plaintiff might at common law, upon the facts, have maintained *assumpsit* for money had and received by the defendant to the plaintiff's use, and the law, in the interest of justice and by way of promoting the remedy, which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect an affirmance of its validity, but only an implication or fiction of law that upon the facts—the plaintiff being entitled *ex æquo et bono*

to recover the money which the defendant had wrongly obtained from it—he promised to repay the same.

“The case of *Catts v. Pahalen*, 2 How. 376, is directly in point and decisive of the one at bar upon this question. In it the supreme court held that when a person was employed to draw an illegal lottery, and secretly procured a ticket therein, to be purchased in the name of another for himself, and thereafter fraudulently pretend that such ticket drew a prize of \$15,000. which was paid by the proprietors in ignorance of the fraud, that they might maintain an action against the drawer to recover the amount so fraudulently obtained.

“In delivering the opinion of the court, Mr. Justice Baldwin said: ‘The facts of the case present a scene of deeply concocted, deliberate, gross, and most wicked fraud, which the defendant neither attempted to disprove nor mitigate at the trial, the consequence of which is that he has not, and cannot have, any better standing in court than if he had never owned a ticket in the lottery, or it had never been drawn. So far as he is concerned, the law annuls the pretended drawing of the prize he claimed; and, in point of law, he did not draw the lottery. His fraud avoids not only his acts, but places him in the same position as if there had been no drawing in fact, and he had claimed and received the money of the plaintiffs by means of any other false pretence, and he is estopped from avowing that the lottery was in fact drawn \* \* \* The transaction between the parties did not originate in the drawing of an illegal lottery; the money was not paid on a ticket which was entitled to or drew the prize. It was paid and received on the false assertion of the fact. The contract which the law raises between them is not founded on the drawing of the lottery, but on the obligation to refund the money which has been received by falsehood and fraud, by the assertion of a drawing which never took place. To state is to decide such a case.’

“So, here, assuming, as this defence admits, that this money was obtained from the plaintiff as alleged in the bill, the trust or contract which the law raises or implies between the parties is not founded on the illegal contract of insurance, but on the obligation of the defendant to refund the money which he obtained from the plaintiff by falsehood and fraud, by the assertion and representation of a death which never took place. To state such a case is to decide it, also. Indeed, it appears to me that if the defendant had robbed the agent of the plaintiff in this state of this money on the highway, he might with as good grace defend an action to recover the stolen property, on the ground that the plaintiff was not authorized to do business in this state, as in the present case. Although the defendant was not authorized to do an insurance business in this state, this fact did not license the defendant to rob or defraud it under pretence of doing such business with it.” (*Northwestern Mutual Life Insurance Co. v. Elliott*, Vol. 5. Fed. Rep., pp. 229 to 231.)

Concerning the measure of recovery in such cases, Judge Keener remarks (Keener on Quasi-Contracts, p. 183):

“Since the plaintiff’s claim rests upon the fact that the defendant cannot be allowed in good conscience to keep what he has obtained, the measure of the plaintiff’s recovery is not the entire amount

paid by the plaintiff, but the amount which it is against conscience for the defendant to keep". Citing *The Western Assurance Co. v. Towle*, 65 Wisc. 247, 253.

In the case cited by Judge Keener, the court says:

"We think the claim of the learned counsel for the appellant, that the amended complaint must be treated as an action to recover damages for the tortious acts of the defendants, and not an action upon an implied contract on the part of the defendants to pay the money received by them from the plaintiff wrongfully, was decided against them by this court in the case of *Town of Fifield v. Sweeney*, 62 Wis. 204. In that case, as one cause of action, the complaint alleged that the defendant furnished teams to work for the town at three dollars per day; that the teams worked in fact 232 days, and 'that the defendant falsely and fraudulently represented, by false statements of account and bills rendered, that his teams had worked in the aggregate 265 days; that he knew such statements to be false, and that he made them for the purpose of deceiving the town officers; that said officers believed such false representations, and by reason thereof paid the defendant for thirty-three days in excess of the time actually worked by his teams: that town orders were issued for said team work, and paid by the town treasurer before the error was discovered; and that the plaintiff has sustained damages herein in the sum of \$99. and interest.' There was also in the complaint in that action an allegation of a demand for the amount of the money fraudulently obtained from the town, and a refusal to pay, before the action was commenced, as in the case at bar. This case is, in all its general features, the same as the one at bar; and it was held that 'the whole complaint goes upon an implied *assumpsit* to repay the money so had and received, and interest thereon, and no other damage by reason of the fraud or mistake is claimed. The complaint as for money had and received by which the *assumpsit* is implied, and these facts do not change the action into tort.'

"The court has repeatedly held that the plaintiff may waive the tort and recover upon an implied contract, when money or property has been obtained by the defendant from the plaintiff by the tortious acts of the defendant. *Norden v. Jones*, 33 Wis. 600; *Keyes v. M. & St. P. R. R. Co.* 25 Wis. 691; *Elliott v. Jackson*, 3 Wis. 649, 655; *Grannis v. Hooker*, 29 Wis. 65; *Smith v. Schulenberg*, 34 Wis. 41, 50; *Wells v. Am. Exp. Co.* 49 Wis. 224; *Graham v. C., M. & St. P. R. Co.* 53 Wis. 473, 481. What was said in the last case cited is not, we think, in conflict with the decision in the case of *Town of Fifield v. Sweeney*, *supra*. Each complaint must be judged of upon the exact facts stated in it in order to determine whether it be an action in tort or on contract. And in determining that question, the evident intention of the party in stating his facts must have effect in determining the question when the facts alleged might sustain a cause of action either in tort or on contract. As was said in the *Graham Case*: 'The original complaint was in tort; and as the second amended complaint stated facts sufficient in themselves to constitute an action for tort, the court would presume that the pleader intended to go upon the tort as his ground of action, and not upon the implied *assumpsit*. To hold that the amended complaint was intended to

be an action of tort would be consistent with the original cause of action stated, and would be a permissible amendment. To hold otherwise would be inconsistent with the original, and not permissible.' So, in the case at bar, the plaintiff having caused an attachment to issue in the action, we must presume that he intended that his complaint should state a cause of action on contract, in order to sustain his proceeding by attachment; and the facts alleged being sufficient to allow him to recover on the implied *assumpsit*, the complaint should be construed as an action upon contract, and not to recover damages for the tort." (*The Western Assurance Co. vs. Towle*, Wis. 65, p. 255, 256.)

In view of the doctrines thus uniformly and universally laid down by the text-writers (both of the civil and the common law) and by the courts, the Government of the United States submits that not only under those principles of equity and justice which must always obtain in and control the intercourse of sovereign states seeking to honor and maintain the mutual respect each of the other, but also under the fundamental principles of the system of municipal law governing and controlling transactions between private parties of the respective governments, the Government of Chile has, by reason of her appropriation of funds which had already been allocated to the satisfaction of a legal and binding obligation, become liable to the Government of the United States for and in behalf of the claimants to the extent of the liability recognized by the contract which allocated said funds to the debt recognized in the contract.

However, a complete exposition of this phase of the case of the United States requires that some explanation should be made regarding Bolivian customs receipts and arrangements at the time of, prior to, and immediately following the making of the Wheelwright contract of 1876.

It will be recalled that in the discussion of Point I, Sub-Point B, *supra*, an extract was inserted from the report of the Minister of Hacienda and Industry of Bolivia for the year 1877, in which the Minister set forth the circumstances and conditions out of which this contract arose in the following words:

"Second. This fund was the only one available as was set out in the budget. The others which were not available and whatever others might have been raised should have belonged to John Wheelwright, representative of the credit of Lopez Gama to whom, by the decrees of December 18th, 1875, and January 22, 1876, there had been allotted all the revenues which were not pledged in the budget. Besides the contract accepted by these decrees, deprived the Government of 70,000 bolivianos cash from the Treasury of Cobija which had been annually assigned for the payment of the interest upon the

debt acknowledged due him. This interest was excessive, having been charged at eight per cent per annum, compoundable. With such a contract the Government found itself without funds whereof to dispose for all the ordinary ones had been exhausted, and without means of creating any other resources because there were applied beforehand to the extinguishment of said debt all the extraordinary revenues or those of a new creation. That contract could not be more burdensome because of the embarrassment and difficulty in which the Government was placed in attending to the necessities of its working and administration. It was necessary, in view of a new proposal from Mr. Wheelwright to formulate and agree upon a compromise which should better the conditions of the contract, favoring and lightening the burden of the Treasury and giving to the Government liberty and resources to obtain funds for itself. *Thus the compromise of the 24th of December 1876, was reached whereby there was deducted from the admitted principal the interest which had already been paid and this latter was reduced to 5 per cent, not compoundable, the payment of the principal to be made by drafts upon the excess which might be obtained over the present amount of the proceeds of the Custom House of Arica.*

"By this means the revenue from the bullion and nitrates became free because even if these latter were considered by the resolution of the 30th of March of 1876, not to be included in the contract of the 18th of December, 1875, the force of this resolution by the terms of said contract might be disputed."<sup>a</sup>

As has already been pointed out, the contract of December 26, 1876, consisted essentially of two parts. First, the recognition of the debt of 835,000 bolivianos, with interest at 5 per cent, and the attending provision which provided for the payment of this debt from the receipts of the Customs House of Arica; secondly, a concessionary grant of a mining concession under the contract, which provided for the distribution of the receipts by certain fixed percentages between the concessionaries and the Government of Bolivia, with the provision that the percentage belonging to Bolivia should be applied to the liquidation of the principal debt so long as said debt remained unpaid, and after that to be paid over to the Government of Bolivia.

Now it is perfectly clear from the report of the Minister of Hacienda, as above quoted, that the Government of Bolivia considered, understood, and acted upon the assumption that the debt was to be liquidated primarily from the receipts of the Arica Customs House. The Minister says:

"Thus the compromise of the 24th of December 1876, was reached whereby there was deducted from the admitted principal the interest which had already been paid and this latter was reduced to 5 per cent, not compoundable, the payment of the principal to be made by drafts upon the excess proceeds of the Customs House of Arica."<sup>b</sup>

<sup>a</sup> I Appendix, p. 340.

<sup>b</sup> I Appendix, p. 341.

That such was the real intention of the parties finds further confirmation in another extract from the same report, also quoted under Point I, Sub-Point B, *supra*.

This extract reads as follows:

"The contract of the National Custom House at Arica was opportunely rejected in order to be terminated or renewed by another. To attain this latter end a plenipotentiary constituted himself at Lima with the convenient instructions. It is to be hoped that in the event of arriving at the renewal same be made with the proportionate increase caused by the great development and increase which have taken place in our commerce at the ports of Arica and Mollendo as well as the arrangements of other points of vital importance for the country. Should such not be the case the offer which the Nationals at present make presents many probabilities of utility and advantage for the Country being evidently in both cases conducive to the improvement of the situation in this respect.

"It is true, as said in the second clause, the increase over the actual sum of the product of that Custom House is destined to the payment of the indebtedness recognized to Wheelwright but even if thereby a privation is incurred which prevents the free employment of those funds the satisfaction remains of the fulfilment of a duty and the exemption of an obligation of which it was indispensable to be relieved."<sup>a</sup>

It is also clear that Wheelwright understood and considered that he was to look primarily to the Customs House receipts for the payment of his indebtedness. In his letter to the American Minister of June 28, 1884, he expressed himself on this point as follows:

"As will be seen by perusal of the translated document alluded to, there exists two forms of security, from which payment is to be realized, the *first* and *most important* of which relates to Custom House revenue; and more especially so, as not having been able to induce Chile to give me undisturbed possession of the mines, in conformity with the Bolivian decree of twenty third of December 1876, only heavy expenses in maintenance of my rights instead of benefit have been the consequence of my efforts.

"In view of these two *pledges*, not only entirely distinct, but affecting the territory of both Peru and Bolivia I suggested to the Minister of Finance that *separate decrees* be made, and he yielded to my request after being urged, but I regret to say that the separation of guarantees was not made with sufficient clearness as to treat them in the way desired.

"I was actuated thereto, so as to be prepared for the opportunity of, in the first place, negotiating the drafts that for the total amount of indebtedness and interest, were to be delivered me, and which the liquidating firm would most naturally prefer to pursue."

Later in his letter, after calling attention to the fact that, notwithstanding his personal request addressed to the Bolivian nego-

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<sup>a</sup> I Appendix, p. 341.

tiators and his request through his agents at Santiago, John Stewart Jackson, addressed to the Chilean Government, no provision for the settlement of his claim from the Arica customs receipts had been made in the Pact of Truce, Mr. Wheelwright said:

"Yet it will be seen that Chile has taken *excessive* care, while disregarding *my* rights to protect such of her citizens as may have been prejudiced, and which losses originated mainly from mines in Bolivia. Not only so, but to provide therefor [it] has been stipulated in the treaty agreement that *forty per cent* of the Arica Custom House revenue be appropriated to this purpose. In adopting this measure, Bolivia may have been unavoidably obligated, under pressure from the conqueror, but Chile, already aware of the pledge given in 1876 by the former becomes a participant, to the exclusion of my previously acquired rights as far as that percentage of revenue could be applied.

"The proportion of 35 per cent of the entire receipts from the same source is to be appropriated by *Bolivia with the consent of Chile*, both being stolidly indifferent to what transpired nearly eight years since, and in consequence of belligerent acts until recently, has never been made effective, much to the detriment of neutrals, who, as before stated, compose the American firm of Alsop & Co. formerly transacting business in Chile.

"The annual return from the aforesaid Custom House is estimated by the Chilean press not to fall short of \$1,500,000, taking as a basis of calculations the receipts of the years 1882 and 1883.

"Supposing that a minimum of (\$1,000,000) one million dollars in silver be realized, there would result an excess of (\$595,000) five hundred and ninety-five thousand dollars over and above the amount formerly paid by Peru to Bolivia. Or, granting to Chile, if need be, for indemnity, the twenty-five per cent allotted thereto, and deducting from the remainder on the same basis, the (\$405,000) four hundred and five thousand dollars specified in the contract of 6th of December, 1876 it would appear that *Chile should* pay to the undersigned instead of to Bolivia, the sum of (\$345,000) three hundred and forty-five thousand dollars in silver yearly, or in like proportion, as the said Custom House duties may result to be more or less than the one million dollars in silver, taken as the annual estimate.

"Likewise, it would seem but perfectly equitable that Chile should continue to pay in the manner aforesaid until the sum of (\$835,000) eight hundred and thirty-five thousand dollars in silver, distinctly expressed in the contract of 6th December, 1876, and interest thereupon from that date at the rate of five per cent per annum, should cancel the indebtedness of Bolivia to the liquidating firm of Alsop & Co., represented by the undersigned, and formally acknowledged by the aforesaid Government of Bolivia. The foregoing views are humbly submitted as a candid opinion of the case in point, and in view of all that has been experienced hitherto in the way of prejudices, disappointments, evasions, and unjust treatment, but without taking into account adequate compensation for all such during the period of years."<sup>a</sup>

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<sup>a</sup> I Appendix, p. 17.



That the Government of Bolivia and Wheelwright himself were justified in the reliance which they placed in the ability of the Government of Bolivia to discharge this indebtedness from the proceeds of the Arica Customs House, as provided in the Wheelwright contract, is amply shown by the following table giving the customs receipts at the port of Arica for the years 1869-1877. This table shows that there was being received from the Arica Customs House far more than enough (in 1875 more than double and in 1876 one and a half times, while in 1874 more than two and a half times) to meet the 405,000 bolivianos called for by the contract.

*Notes taken from tables appearing in the Memorias de Hacienda giving the receipts of the Northern (Arica) Customs House.*

	Soles.
1st half-year, 1869.....	211, 415. 94
2nd half year 1869.....	404, 451. 08
1st half year 1870.....	332, 103. 87
1st one-fourth year 1872.....	224, 841. 64
In the whole year 1874.....	1, 079, 773. 00
In the whole year 1875.....	894, 525. 04
In the whole year 1876.....	677, 129. 21
In the whole year 1877.....	872, 552. 25

The customs arrangements at the time the Wheelwright contract was made and which were in contemplation by both parties during the negotiation of the contract, were as follows:

Under date of July 23, 1870, the duly accredited representatives of the Governments of Bolivia and Peru had negotiated and concluded a "Treaty of Commerce and Customs." It was provided in articles 5 and 6 of this treaty that—

"The commerce in foreign merchandise or effects which may be conducted into Bolivia by means of the frontier of Peru \* \* \* shall pay the duties of importation in the custom houses of Peru from which they may be shipped, their valuation being fixed in accordance with the Peruvian tariff, and the value of said duties being the property of Peru."<sup>a</sup>

It was stipulated in article 8 of the treaty that—

"The Republic of Peru, by virtue of the benefits which its nationals enjoy on account of the stipulations contained in articles 1 and 3, obligates itself, on its part, to pay to Bolivia the sum of four hundred thousand soles (\$ 400,000), per annum, payable by the Treasury of Lima in monthly installments of thirty-three thousand, three hundred and thirty-three soles and thirty-three centavos (\$ 33,333.33)."<sup>a</sup>

<sup>a</sup> I Appendix, p. 379.

By the terms of Article 15 of the treaty it was provided that the treaty should run for five years from the day "on which its execution commences," but it was further provided in said article that—

"In order that this treaty may terminate within the period of five years above fixed, it is necessary that either of the two High Contracting Parties shall give the proper notice to the other of its conclusion, eighteen months before the expiration of said period; but if neither of them should make such an intimation, the treaty shall continue for both parties until eighteen months after the day on which the notification of termination by either of them may be given."<sup>a</sup>

Pursuant to the provisions of this article, the Government of Bolivia had, under date of October 5, 1876, notified the Government of Peru of its intention to cancel this arrangement. This decree read as follows:

[Translation.]

*Circular of October 5.*

"CUSTOM HOUSE OF ARICA: NOTICE OF THE CANCELLATION OF THE CONVENTION OF COMMERCE AND CUSTOMS.

"OFFICE OF THE SECRETARY-GENERAL OF STATE,

*"La Paz, October 5, 1876.*

"SIR: I have the honor to address myself to Your Excellency with the object of communicating to you that the Government of Bolivia has resolved to give notice on this date to the most excellent Government of Peru of the cancellation stipulated in Article 15 of the Convention of Commerce and Customs concluded between both Republics and signed by their plenipotentiaries on July 23, 1870, to the end that the effects thereof may cease within the term fixed by the aforesaid article of that Convention.

"Your Excellency will understand that this act on the part of the Government of Bolivia does not imply the slightest disagreement in the friendly relations which it happily maintains with the Government of Your Excellency, and is only meant to open new negotiations which shall result in a new agreement which may be more equitable and more satisfactory to the true interests of both Republics.

"I avail myself, Mr. Minister, of this occasion to reiterate to Your Excellency the assurance of the high consideration with which I subscribe myself Your Excellency's obedient and humble servant,

"(Signed) JORJE OBLITAS.

"To His Excellency the

"MINISTER OF FOREIGN RELATIONS OF PERU,

*"Lima."*<sup>b</sup>

It will be recalled that Article 2 of the Wheelwright decree of December 24, 1876, provided that—

"The said principal and interest shall be amortized by means of drafts all of which are to be drawn in quarterly installments on the surplus which, from the date on which the present customs contract with Peru terminates, shall arise, from the quota due Bolivia in the collection of duties in the Northern Custom house, over and above

<sup>a</sup> I Appendix, p. 381.

<sup>b</sup> I Appendix, p. 383.

the 405,000 bolivianos which the Peruvian Government now pays,—whether the customs treaty with that Republic is renewed or whether the National custom house is reestablished.”<sup>a</sup>

It will thus be observed that at the very time the Wheelwright contract was drawn the Government of Bolivia had given notice of its intention to terminate the Treaty of 1870 and was evidently considering the question whether it should re-establish the national customs house, in which case it would itself collect the duties upon foreign merchandise imported into Bolivia, or should make a new arrangement by which that service should be performed by the Government of Peru.

It will also be recalled that in his memorial to the Bolivian Congress in 1877 the Minister of Hacienda, as quoted above, pointed out that “the termination of this treaty and customs arrangement with Peru would undoubtedly result in an increase of the customs receipts proportionate to the great development and increase which have taken place in our commerce at the ports of Arica and Molendo.”

That this belief of the Bolivian officials was justified by the receipts of the Arica Custom House seems to be shown by the following table with notes annexed thereto, which table and notes are in the handwriting of and appear to have been prepared by Wheelwright himself. While the total amounts given do not in all cases precisely agree with those already quoted above, they are sufficiently near to indicate the extent of the importations coming through Arica to Bolivia.

*“Data concerning the Custom House of Arica in relation to the Customs Contract of Bolivia.”*

Year.	Gross receipts.	Estimates.	Net receipts.	Quota for Bolivia.	Quota for Peru.
1870.....	\$ 994,383.90	24,912.00	969,471.00	405,000.00	564,471.00
1871.....	826,251.83	24,912.00	801,339.83	405,000.00	396,339.83
1872.....	894,580.24	24,912.00	869,672.24	405,000.00	464,672.24
1873.....	1,008,656.15	54,090.00	954,566.15	405,000.00	549,566.15
1874.....	1,084,686.02	54,090.00	1,030,596.02	405,000.00	625,596.02
1875.....	983,702.16	56,080.00	927,622.16	405,000.00	522,622.16
1876.....	707,042.20	56,080.00	650,962.20	405,000.00	245,962.20

“NOTES. 1. This data is taken from an official source.

“2. According to the books of the Customs-House of Arica, it produced in the year 1875 only the sum of \$937,393.43 but to this sum there should be added \$23,454.73 corresponding to 30 % of \$78,182.44 which the month of August produced, and \$22,854.00, corresponding to 20 % of \$114,270.32 for the month of September on account of the reduction made by the Government upon the Customs-House.

“3. The diminution of receipts noted in the last year is due to the importation which was made in that year via Arequipa and Lake Titicaca.

“4. There is not introduced through the Aduana of Arica a single package which is not for the consumption of the Department of Tacna and for the north and center of Bolivia and this has been so for more than six years back.

<sup>a</sup> I Appendix, p. 9.

"According to this certain antecedent, the latter department's consumption is a twenty-ninth part of that of Bolivia, as will be seen by the following statement:

"Comparative table of the population of the Department of Tacna and the population of the North and Center of Bolivia:

"Population of Dept. of La Paz, last census.....	443, 779
"Ditto for Cocacaomba .....	312, 919
"Population of the Department of Onuro.....	91, 754
"Half of the population of Potosí.....	127, 364
"Half of the population of Santa Cruz.....	77, 799
<hr/>	
"Total consumers in Bolivia.....	1, 053, 615
"Population of Dept. of Tacna, census of 1876.....	35, 906
"Difference of consumers in favor of Bolivia.....	1, 017, 909

"Equal totals.....	1, 053, 615	1, 053, 615
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"NOTES. 1. As the Department of Potosí possesses the Custom-house of Arica as well as that of Cobija, only one-half of its population is taken.

"2. Likewise I take (half) of the population of Santa Cruz which is in the same situation, possessing both the markets of Sucre and Cochabamba."

From these tables and figures it would appear that even if these data are but approximate it would seem reasonably evident that in place of Bolivia's getting the 405,000 bolivianos per annum from the customs receipts of Arica, which was coming to that Government under the existing arrangement with Peru under the table above given (which sum was but about one-half of the total receipts collected at that port), the Government of Bolivia was entitled to receive twenty-eight twenty-ninths of the net customs receipts collected at that port. It thus was not without reason that the Government of Bolivia and Wheelwright both regarded the liquidation of his debt as assured from this source.

Concerning the termination of the Customs Treaty of 1870 between Bolivia and Peru, Mr. H. S. Prevost, in a deposition taken at Lima, Peru, on January 22, 1894, made the following statement:

"That at the time of the execution, December 1, 1876, of the contract between the government of Bolivia and the representative of the liquidation of Alsop and Co. there existed between the Republics of Peru and Bolivia the Customs treaty dated July 23, 1870, the ratifications of which were only exchanged and that only commenced to take effect the 24th of December, 1872. This treaty which was revokable by any one of the parties with previous notice of 18 months was revoked by the government of Bolivia in the month of October of 1876. Therefore it should have expired in the month of April, 1878, but by the consent of both parties it continued to govern until the month of May, 1879, at which date the ratifications were exchanged and a new treaty, which had been signed in the month of October, 1878, commenced to govern. This new treaty still governed at the date of the occupation of Arica by the military forces of Chile in the month of June, (1880) and continued to govern until the month of June, 1881 when the treaty which still at the present time regulates the custom house decisions between the Republics of Peru and Bolivia began to govern." <sup>a</sup>

The Treaty of October, 1878, to which Mr. Prevost refers, which took the place of the Treaty of 1870 and which would have governed the distribution of the customs receipts as between Bolivia and Peru, provided in Article 5 as follows: .

"In compensation for the services which Peru affords to Bolivian trade, and for the facilities she gives in permitting the importation and exportation to be made through her ports, in permitting the use of her custom houses, the services of her employees, and public buildings, there is established, as the sole charge therefor, a duty of four per cent. in silver soles or its equivalent in authorized bank notes, upon foreign merchandise, introduced through its territory for consumption in Bolivia; the invoice valuation, or the tariff list if that should be preferable, may serve as a basis of value."<sup>a</sup>

Under a supplemental protocol dated January 11, 1879, it was provided in article 1 as follows:

"The charge of four per cent established in clause 5 of said agreement, as compensation for the services that Peru lends to the commerce of Bolivia, shall be raised to five per cent, and its application shall be made in accordance with the original invoice or the Peruvian customs tariff, if proper, and with the other conditions therein established."<sup>b</sup>

As has been already stated, the war between Chile and Bolivia began in February of the year in which this treaty was made; and, Peru having also become a party to the war, the Custom House at Arica was taken by the middle of the year 1880. From this time, the middle of 1880, until the Pact of Truce of 1884, the Government of Chile levied, collected, and appropriated all of the customs receipts of this port. These customs receipts, so levied, collected, and appropriated, were, according to the official returns of the Government of Chile, in the following amounts:

	Bolivianos.
1880 (second half-year).....	287, 315. 00
1881.....	1, 278, 488. 00
1882.....	1, 622, 323. 50
1883.....	1, 463, 201. 22
1884.....	.837, 764. 56

Under the terms of the treaty existing between Bolivia and Peru at the time the war commenced it would appear that all but five per cent of this amount would have gone to Bolivia. Under this arrangement and distribution, therefore, Wheelwright would have received the following amounts:

Nothing, perhaps, in 1880; in 1881, 809,564 bolivianos; in 1882, 1,136,205 bolivianos, or so much thereof as was necessary in order fully to meet the amount of his debt. Or in other words by the middle of 1882 the Wheelwright debt would have been fully satisfied.

<sup>a</sup> I Appendix, p. 391.

<sup>b</sup> I Appendix, p. 395.

The Government of Chile by appropriating this money, which, under every principle of law, equity, and justice, belonged to Wheelwright, rendered itself fully and absolutely liable for the satisfaction of the Wheelwright debt, principal and interest.

Not only is this conclusion,—the resultant of the broad and fundamental principles common to the civil law and to the common law,—supported by universal considerations of equity and justice which, *aequo et bono*, should govern the relations between sovereign states themselves and between sovereign states and individuals, but it is also in strict consonance with the rules laid down by writers on international law, as well as with the uniform practice which has heretofore obtained in international relations between sovereign states.

It should in connection with a consideration of these propositions be recalled that the first and second articles of the Decree of December 24, 1876, provided as follows:

“First. The sum of 835,000 bolivianos is acknowledged as due the aforesaid representative of the firm of Alsop & Co., together with interest at the rate of 5 % per annum, not addable to the principal, and to be reckoned from the date on which this contract is duly executed.

“Second. The said principal and interest shall be amortized by means of drafts all of which are to be drawn in quarterly installments on the surplus which, from the date on which the present customs contract with Peru terminates, shall arise, from the quota due Bolivia in the collection of duties in the Northern custom house, over and above the 405,000 bolivianos which the Peruvian Government now pays,—whether the customs treaty with that Republic is renewed or whether the National custom house is re-established.”<sup>a</sup>

It will be observed that these articles (1) recognize a principal debt of 835,000 bolivianos, with interest at 5 %; and (2) provide that this principal and interest shall be “amortized by means of drafts \* \* \* drawn in quarterly installments on the surplus which \* \* \* shall arise from the quota due Bolivia in the collection of duties in the Northern custom house, over and above the 405,000 bolivianos which the Peruvian Government now pays.”

As has been repeatedly stated above, it is not believed that it can be successfully contended that this is not a complete appropriation of these specified surplus funds to the payment of this obligation, since nothing further whatsoever is necessary to do in order to entitle Wheelwright to these receipts except that there should first be an excess over the 405,000 bolivianos per year, and second that he should draw drafts thereon.

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<sup>a</sup> I Appendix, p. 9.

Concerning this situation of affairs, Hall in his "Treatise on International Law," (5th ed., p. 420) lays down the following rule:

"He (a belligerent in military occupation of foreign territory) levies the taxes and customs, and after meeting the expenses of administration in territory of which he is in hostile occupation, he takes such sum as may remain for his own use."

But, adds Mr. Hall in a note,

*"From the taxes, customs, or other state revenues which an enemy may take for his own use must be excepted any which have been hypothecated by the state in payment of any loan contracted with foreign lenders before the commencement of the war."*

Therefore, even granting that this contract was merely an hypothecation of the customs revenue, instead of being, as it is, an actual appropriation of the revenues, the Government of Chile would not be and could not be considered as exercising a legitimate belligerent right in appropriating the funds which had been thus appropriated for the payment of the Wheelwright debt; and when it is considered that here there was not an "hypothecation" only, even in a general sense, but an actual appropriation of the customs receipts, which was so recognized by the Government of Bolivia, the operation of the principle laid down by Mr. Hall becomes too clear for argument.

The same general principle as to belligerent rights is also expressly recognized by Westlake in his work on International Law (Part I, p. 62), in which, speaking of the payment of obligations resting upon a transferred province, the author says:

"The fundholders have no legal claim on the acquiring state beyond the part of the debt, if any, so assumed, *unless their contract gave them a specific security on the revenues of the ceded province, or on state property in that province which passes by the cession.*"

But not only have the text writers laid down this rule, but the nations have in a number of instances definitely and expressly applied such rule to their international dealings. Among the many instances of this sort it is sufficient, in order to show the custom of nations, to quote two of great historic importance.

The first of these is that of the Silesian Loan.

The facts of this case as set forth in Snow's Cases on International Law (pp. 243-244), are as follows:

"In 1735 the Emperor Charles VI. borrowed of several London merchants the sum of 1,000,000 écus (3,000,000 francs), and as security for repayment, gave them a mortgage on the revenues of the Province of Silesia. After the death of the Emperor (1740) Frederick II. of Prussia seized Silesia, which Maria Theresa was constrained to formally cede to him by the treaties of Breslau and

Berlin, 1742. Frederick agreed, however, to assume the debt of the province and to pay the English creditors.

"In 1744 war broke out between England on the one side and France and Spain on the other. And during the next four years the English seized eighteen Prussian vessels and thirty-three other neutral vessels, freighted in whole or in part by Prussian subjects, and laden with merchandise on account of French subjects. These ships and their cargoes were seized for carrying contraband of war or goods belonging to the enemy.

"The government of England having refused to listen to the demand of the Prussian government for an indemnity to the claimants, Frederick II. appointed a commission in 1751 to examine these claims and compensate the claimants out of the Silesian loan, the payment of which had been withheld for this purpose. The next year the commission gave judgment, transferring the English mortgage on the Silesian revenues to the Prussian claimants as indemnity for the seizure of their property.

"The contention of the Prussian government was that England had acted illegally in capturing the property of her enemies on neutral vessels,—that the rule, supported by the practice of most of the nations of Europe, was "free ships, free goods;" and further that the treaties of England with neutral powers, confirmed by the declarations of the English ministry to diplomatic agents of Prussia, had exempted such goods from capture. According to the law of nature, say the Prussian commissioners, the vessel of a neutral is his property wherever it may be found (i. e. on the high seas), and a belligerent has no more right to enter it to seize the goods of his enemy, than he has to enter a neutral port and seize the vessels of his enemy there anchored.

"As to contraband of war, the general rule of international law limited it to munitions of war, the only exception being things of *ancipitis usus* destined to a besieged or blockaded port. It was shown that England herself had made several treaties in which provisions and articles of naval construction were expressly excluded from the list of contraband.

"Finally, it was asserted, that the English admiralty court had no right of jurisdiction over Prussian vessels or cargoes seized in places not within English territory; and that these unjust confiscations furnished a just cause for reprisals on the part of Prussia.

"The matter was referred by the English government to a commission, composed of Sir R. Lee, judge of the Supreme Court, Dr. Paul, the King's Advocate General in the civil courts, Sir Dudley Ryder, the Attorney-General, and Mr. William Murray, Solicitor General (celebrated later as Lord Mansfield). The report of this commission is mentioned by Montesquieu as *réponse sans réplique*."

That part of the Commission's Report dealing with the question of the confiscation of the loan is contained in the "Seventh Proposition of the Report," the answer to which is given in the following words:

"Answer. These captures were not made in time of war with any power.

"They were not judged of by our courts of admiralty, according to the law of nations and treaties, but by rules, which were them-



selves complained of in revenue courts; the damages were afterwards admitted, liquidated at a certain sum, and agreed to be paid by a convention, which was not performed; therefore reprisals issued, but they were general. No debts due here to Spaniards were stopped; no Spanish effects here were seized; which leads to one observation more.

"The King of Prussia has engaged his royal word to pay the Silesia debt to private men.

"It is negotiable, and many parts may have been assigned to the subjects of other powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way, by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no enquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.

"This loan to the late Emperor of Germany, Charles VIth, in January 1734-5, was not a state transaction, but a mere private contract with the lenders, who advanced their money upon the Emperor's obliging himself, his heirs and posterity, to repay the principal, with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay, demur, deduction or abatement whatsoever; and, lest the words and instruments made use of should not be strong enough, he promises to secure the performance of his contract in and by such other instruments, method, manner, form, and words, as should be most effectual and valid to bind the said emperor, his heirs, successors and posterity, or as the lenders should reasonably desire.

"As a specific real security, he mortgaged his revenues arising from the Duchies of Upper and Lower Silesia for payment of principal and interest; and the whole debt, principal and interest, was to be discharged in the year 1745. If the money could not be paid out of the revenues of Silesia, the emperor, his heirs and posterity, still remained debtors, and were bound to pay. The eviction or destruction of a thing mortgaged, does not extinguish the debt or discharge the debtor.

"Therefore the empress queen without the consent of the lenders, made it a condition of her yielding the Duchies of Silesia to his Prussian majesty, that he should stand in the place of the late emperor in respect of this debt.

"The seventh of the preliminary articles between the queen of Hungary and the king of Prussia, signed at Breslau the 11th of June 1742, is in these words: "*Sa majesté le roi de Prussia se charge du seul payement de la somme hypothéquée sur le Silesia, aux marchands Anglois selon le contract signé à Londres le 7me de Janvier 1734-5.*"

"This stipulation is confirmed by the ninth article of the treaty between their said majesties, signed at Berlin the 28th of July 1742.

"Also renewed and confirmed by the second article of the treaty between their said majesties, signed at Dresden the 25th of December 1745.

"In consideration of the empress queen's cession, his Prussian majesty has engaged to her that he will pay this money *selon le contract*, and consequently has bound himself to stand in the place of the late emperor in respect of this money, to all intents and purposes.

"The late emperor could not have seized this money as reprisals, or even in case of open war between the two nations, because his faith was engaged to pay it without any delay, demur, deduction, or abatement whatsoever. If these words should not extend to all possible cases, he hath plighted his honour to bind himself by any other form of words more effectually to pay the money; and therefore was liable at any time to be called upon to declare expressly that it should not be seized as reprisals, or in case of war; which is very commonly expressed when sovereign princes or states borrow money from foreigners. Therefore, supposing for a moment that his Prussian majesty's complaint was founded in justice and the law of nations, and that he had a right to make reprisals in general, he could not, consistent with his engagements to the empress queen, seize this money as reprisals. Besides, this whole debt, according to the contract, ought to have been discharged in 1745. It should, in respect of the private creditors, in justice and equity, be considered as if the contract had been performed; and the Prussian complaints do not begin till 1746, after the whole debt ought to have been paid.

"Upon this principle of natural justice, French ships and effects wrongfully taken after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property here during the war; because, had it not been for the wrong first done, these effects would not have been in your majesty's dominions. So, had not the contract been first broke by non-payment of the whole loan in 1745, this money would not have been in his Prussian majesty's hands.

"Your majesty's guaranty of these treaties is entire, and must therefore depend upon the same conditions upon which the cession was made by the empress queen.

"But this reasoning is, in some measure, superfluous; because, if the making any reprisals upon this occasion be unjustifiable, which we apprehend we have shewn, then it is not disputed but that the non-payment of this money would be a breach of his Prussian majesty's engagements, and a renunciation, on his part, of those treaties.

"All which is most humbly submitted to your majesty's royal wisdom."

(Collectanea Juridica, pp. 154-157.)

The second instance to which reference will be made has to do with the rights recognized and respected by the powers blockading Venezuela in 1903 with respect to certain Venezuelan customs receipts which, prior to the blockade had already been applied to the payment of certain international obligations which had been incurred by the Government of Venezuela.

The details of this transaction were set forth in the British case in the Preferential Treatment Arbitration at The Hague, as follows:

"From 1835 to the present time Venezuela has been continually engaged in resisting the applications of the powers for payment of the claims of their subjects. Sometimes she has been forced to yield by pressure or threats of pressure, but except on those occasions she appears to have made but little effort to liquidate her liabilities.

"In 1872 the Governments of Great Britain, Germany, France, Denmark, Italy, Spain, the Netherlands, and the United States of America, joined in collective action to obtain security for their claims, and, in consequence, a law was passed in Venezuela in that year providing for the setting aside of a portion of the customs receipts for their discharge. The law provided for the disposal of the total customs receipts in the following manner: Sixty per cent for payment of the public services; 40 per cent for debt and development of the country. This 40 per cent was thus sub-divided: Twenty-seven per cent for interior public debt; 27 per cent for exterior (bondholders); 33 per cent for development of the country, and 13 per cent for the recognized foreign claims.

"The foreign claims secured in this way are known as the 'diplomatic debt,' and the 13 per cent of the 40 per cent is frequently referred to as the '13 per cent of the 40 unities.' The security therefore for the diplomatic debt consists of 5.2 per cent of the customs receipts, and it is material to the purposes of this case to note that the receipts so charged are those of all the ports and not merely of La Guaira and Puerto Cabello. The further security now to be given by Venezuela does not in any way interfere with the existing security for the diplomatic debt. It is a charge on the customs receipts of those two ports only, subject to the prior charge of 5.2 per cent allocated to that debt. It has already been stated that the British claims originally included in the diplomatic debt have since been paid off, with the possible exception of the claim for interest.

"In 1885, and again in April, 1902, the Venezuelan Government entered into fresh agreements with that of France by which further French claims were included in the diplomatic debt, and secured in the same way."

(The Venezuelan Arbitration before The Hague Tribunal, 1903. Report of William L. Penfield, pp. 756-757.)

In a telegram from the Marquess of Lansdowne to Sir M. Herbert under date of January 30, 1903, the Marquess of Lansdowne made the following statement:

"The preferential treatment for which the blockading powers have asked is not, it must be further remembered, one by which either the resources at the disposal of the Venezuelan Government for the payment of the external debt would be exhausted, or by which the so-called 'diplomatic debt,' which amounts to only 5.2 per cent of the total customs revenue of Venezuela, would be interfered with."

(Op. cit., p. 809.)

See also Sir M. Herbert to the Marquess of Lansdowne, January 23, 1903 (op. cit., p. 802); The Marquess of Lansdowne to Sir M. Herbert, January 24, 1903 (op. cit., p. 803).

The French attitude upon the question was set forth in a memorandum from the French Embassy at London to the British Foreign Office. The memorandum was dated November 28, 1902, and read as follows:

"The French Ambassador has informed his Government of the intentions of Lord Lansdowne in regard to Venezuela, which were communicated to him on Wednesday last, the 26th November.

"The British Government appear to be disposed to have recourse to a naval action. Should such action lead to the seizure of the Venezuelan customs the Government of the Republic would have to make certain reservations.

"Thus, in the Franco-Venezuelan treaty of the 26th November, 1885 (De Clerc, Vol. XV, Supplement, p. 903), Article II, runs:

"The sum of 493,970.92 francs, to which will subsequently be added the amount of the indemnities allotted by the mixed commission instituted under this convention, will be met by the proportion accorded monthly to France out of the 13 per cent of the 40 unities of the customs assigned by Venezuela to the diplomatic debt. This monthly quota shall not be less than \* \* \* etc.

"Besides this, there are fresh indemnities to be paid to the French Government out of this same diplomatic debt, in accordance with an arrangement signed at Paris on the 19th February, 1902.

"The effect of these conventions is that a seizure of the resources of the Venezuelan customs would prejudice French interests.

"The French Ambassador brings this position to the notice of the secretary of state for foreign affairs.

"French Embassy, London."

(Op. cit., pp. 785-786.)

The same principle was recognized by each of the other powers appearing before The Hague Tribunal in this arbitration.

It is therefore submitted with all confidence that the obligation of the Government of Chile fully to meet and satisfy, to the last farthing, the debt, principal and interest, recognized by the contract of December 26, 1876, is thus established beyond the possibility of question or doubt.

### *Sub-Point B.*

The Government of Chile is liable for such indebtedness because of repeated solemn undertakings to the Government of Bolivia to meet such obligation—the Government of the United States for and in behalf of the claimants having the rights of a beneficiary under these formal and solemn obligations.

### *Prefatory Summary.*

The Government of Chile has repeatedly undertaken in the various treaties and protocols negotiated and concluded between itself and the Government of Bolivia to recognize and satisfy the obligation running from the Government of Bolivia to Wheelwright, representing the concessionaries under the Wheelwright contract of 1876. So far as is known, the first specific undertaking to this effect was contained in the Matta-Reyes Protocol of May 19, 1891, in which the credit was placed at a value of 835,000 bolivianos, which it was stated also drew interest. The next undertaking was in the projected treaty of Peace and Friendship dated May 18, 1895, in which the credit was assumed without any reservation. The same was true of the protocol of May 28, 1895, and the memorandum referred to therein, which placed the amount of the credit at 835,000 bolivianos "without reckoning interest." On December 9 of the same year a further and supplemental protocol ratified the earlier protocols providing for the payment of this obligation without any limitations whatsoever. Finally, in October, 1904, in the final Treaty of Peace and Friendship between the two Governments, Chile undertook to satisfy certain named obligations, among them "the debt recognized to Don Pedro Lopez Gama represented by Messrs. Alsop & Co., surrogates of the former's rights" and appropriated thereto the sum of 2,000,000 pesos. In order, however, that this stipulation should not appear to limit or be understood as limiting the liability of Chile, the plenipotentiaries of the two Governments exchanged notes which provided that

the Government of Chile should fully answer all demands made for and in behalf of any and all of the claims assumed by Chile, including the Gama or Wheelwright credit. It would thus appear that the obligation to meet these claims is, under the various protocols above named, complete and perfect.

### *Discussion.*

The repeated undertakings of the Government of Chile by formal and solemn protocols and treaties to meet and discharge for and in behalf of the Government of Bolivia the debt recognized by the Wheelwright contract of December 26, 1876, has been already quite fully dealt with under Point I, Sub-point C, *supra*. It is, however, desirable, in order that the present section shall be complete in itself, to incorporate here a considerable part of the discussion set forth in the section referred to.

So far as the Government of the United States is advised, the first undertaking in a formal protocol by the Government of Chile under the Wheelwright contract of 1876 is to be found in the Matta-Reyes Protocol of May 19, 1891. On this date "the Minister of Foreign Relations, Serapio Reyes Ortiz, and Vice President of the Republic of Bolivia, and Mr. Gonzala Matta, Confidential Agent of the Junta de Gobierno, organized on behalf of the Congress of Chile, met in the Department of Foreign Affairs," and—

"in consequence, both parties being animated always with the sincere desire to arrive at a definite arrangement inspired by cordiality which should reign between both nations and recognizing equality in every possible manner, they have agreed to draft the bases of definite treaties which will be taken up when peace shall have been re-established in Chile. These bases, which will serve as a necessary part of the treaties of peace and commerce, were thoroughly discussed and are as follows:

\*            \*            \*            \*            \*            \*

"2nd. *The Government of Chile will take charge of and assume the payment of the obligations recognized by that of Bolivia in favor of the mineral enterprises of Huanchaca, Corrocoro and Oruro, deducting the amounts in accordance with the Compact of Truce, as well as the credits which encumbered the income from the Littoral by reason thereof and which are that of the Garantizador de Valores Bank of Chile, the bonds issued for the construction of the railroad of Mejillones, the credit acknowledged in favor of Lopez Gama representing the house of Alsop & Co. of Valparaiso, and that of 40,000 bolivianos in favor of the Garday family; the products of the custom houses of Arica and Antofagasta, in consequence remaining free of all encumbrance on importations for Bolivia.*"

"3rd. *The sums which make up the credits* referred to above as taken from the books of the National Treasury of Bolivia are as follows:

"Huanchaca Co. ....	1, 280, 000
"Corocoro Co. ....	1, 634, 000
"Oruro. ....	252, 000
"Banco Garantizador de Valores. ....	718, 000
"Railroad of Mejillones. ....	219, 000
"Lopez Gama credit. ....	835, 000
"Garday credit. ....	40, 000
	<hr/>
	4, 978, 000
"Funds deposited. ....	535, 000
	<hr/>
	4, 443, 000

*"The sums approximated are considered without interest; and with which according to the liquidation made, reach the amount of six millions six hundred and four thousand pesos."*<sup>a</sup>

The provisions of this protocol, when taken in connection with the statement made by the Chilean Sub-Secretary of Foreign Relations, in June, 1892, to the American Minister at Santiago, that he recognized that the debt due under the Wheelwright contract drew interest in accordance with the terms of that contract, clearly shows that at this time (that is, in 1891-92) the Government of Chile, as well as the Government of Bolivia, considered as due to the claimants under said contract, not only the principal sum called for by this contract of 1876, but also the interest stipulated and provided for in that same instrument; that this debt *"encumbered the income from the Littoral"* and that by paying this debt *"the products of the custom houses of Arica and Antofagasta, in consequence remaining free of all encumbrance on importations for Bolivia."*

The next formal undertaking of the Government of Chile to meet and discharge this obligation of Bolivia under the Wheelwright contract is to be found in the Treaty of Peace and Friendship which, under date of May 18, 1895, Don Luis Barros Borgoño, Minister of Foreign Relations of Chile, and Don Heriberto Gutierrez, representing Bolivia, signed at Santiago. This provides in article 2 as follows:

*"The Government of Chile assumes the obligations recognized by the Government of Bolivia in favor of the mining enterprises of Huanchaca, Corocoro and Oruro, and binds itself to pay the same as well as the balance of the Bolivian loan raised in Chile in 1867, after deducting therefrom all the sums of money which, under Article Sixth of the Truce, are to be allowed in the settlement of this account.*

<sup>a</sup> II Appendix, p. 372.

*It binds itself furthermore to pay the following debts which encumbered the Bolivian littoral, namely: the bonds issued for the construction of the Mejillones and Caracoles Railroad; the credit of Don Pedro Lopez Gama, now represented by the firm of Alsop & Co., of Valparaiso; the credit of Don Enrique G. Meiggs, represented by Don Edward Squire, founded on contract of May 20, 1876, entered into between the above named Meiggs and the Government of Bolivia, for the farming out of the fiscal nitrate beds at Toco, and the credit recognized in favor of Don Juan Garday.*

*"All these credits shall be individually liquidated, item by item, in a protocol supplementary to the present treaty."*

It will be observed that there is not in this article any suggestion whatsoever that the two Governments here considered the "Gama credit" as being other than that recognized by the Matta-Reyes Protocol of 1891. On the contrary, the obligation is "*to pay the following debts,*" which must be understood as assuming to pay the entire obligation found to be due after the examination provided for both principal and interest. There is no suggestion of an arbitrary fixing of the amount that should be paid.

On May 28, 1895, the same representatives of the respective Governments entered into a supplemental protocol, which reads as follows:

"The undersigned, Don Luis Barros Borgoño, Minister of Foreign Affairs of Chile; and Don Heriberto Gutierrez, Envoy Extraordinary and Minister Plenipotentiary of Bolivia in Chile, having met at the former's office at Santiago, Chile, on this 28th day of May, 1895, for the purpose of defining and precisising the provisions stipulated in art. 2nd of the treaty of peace and amity which has been entered into between the two Republics have agreed to have constancy of the following bases which are to serve for the liquidation of the obligations enumerated in the aforesaid treaty.

"1st. Those credits which, according to the pact of truce (between Chile and Bolivia) of 1884, were recognized by the Govt. of Bolivia, shall continue to be served with an amount equal to the 40 per cent. of the receipts of the Arica Custom House. In order to establish the said amount, an average will be taken of the receipts of the said Custom House during the last five years.

"2nd. The holders of the credits referred to in the preceding clause may receive in payment thereof bonds of the Internal Debt of the Republic of Chile, bearing interest at the rate of 4 per cent. or at rate of 5 per cent. p. a. with 1 per cent. for accumulative amortization, provided that such holders agree, for that purpose, to consider as subsisting the liquidations which, by the contracts executed in 1889, were agreed to by Don Heriberto Gutierrez, acting for the Government of Bolivia, and the said holders.

"3rd. *Those credits which are not included in the declaration aforesaid and which are those of the Mejillones and Caracoles Railway, of Pedro Lopez Gama, of Juan Garday and of John G. Meiggs,*

<sup>a</sup> II Appendix, p. 452.



shall be examined by the Govt. of Chile, which Govt in order to fix the definite amount due and to agree as to the form of payment thereof, will take into account the origin of each credit, and also the antecedents of the same consigned by the Minister of Bolivia in Chile in his memorandum of the 23rd of the present month. (May 23rd 1895).

"4th. Should Bolivia prefer to take to its charge the credits, or part of the credits referred to in the preceding clauses, the amounts to which these may reach are to be deducted from the amount which Bolivia is to pay to Chile in virtue of other stipulations contained in the treaties entered into on the 18th of the present month (treaty of peace and amity and treaty of transfer of territory).

"The memorandum to which reference is made in this protocol (clause 3rd) signed in this city by the Minister of Bolivia in Chile on the 23rd of the present month, is added as an annex thereto.

"In faith whereof and in virtue of the full powers with which they are invested, the undersigned have signed this protocol in two copies.

"(Signed.)

LUIS BARROS BORGONO.

"HERIBERTO GUTIERREZ."<sup>a</sup>

The memorandum referred to in clauses 3 and 5 of the above protocol reads, so far as it relates to the Gama credit, as follows:

"Memorandum of the claims existing against Bolivia with the payment of which the Chilean Government is charged according to Article 2 of the final Treaty of Peace signed between both Republics on May 18, 1895.

*	*	*	*	*	*	*
"Pedro Lopez Gama: Claim recognized in favor of Messrs. Alsop & Co., assignees of the rights of the former, amounting, <i>without reckoning interest</i> , to 835,000 bolivianos at 20d each, which, reduced to Chilean money at an exchange of 17 1-2d, equals . . . \$954, 285. 00						
*	*	*	*	*	*	*

"Santiago, May 23, 1895.

"(Signed)

H. GUTIERREZ, Minister of Bolivia.

"A true copy.

"[SEAL.]

JOSE. SALINAS,<sup>b</sup>

"Chief Clerk of Foreign Relations."

It will be observed that while it was stipulated in Article 3 that the Government of Chile "in order to fix the definite amount due and to agree as to the form of payment thereof, will take into account the origin of each credit, and also the antecedents of the same consigned by the Minister of Bolivia in Chile in his memorandum of the 23rd of the present month," the memorandum to be consulted and relied upon by the Government of Chile under this arrangement definitely specifies that there is "recognized in favor of Messrs. Alsop & Co., assignees of the rights of the former (Pedro Lopez Gama), amounting, *without reckoning interest*, to 835,000 bolivianos at 20d each, which, reduced to Chilean money, at an exchange of 17 1-2d, equals \$954,285.00."

<sup>a</sup> II Appendix, p. 457.

<sup>b</sup> I Appendix, p. 372.

It is too clear, therefore, for argument that in 1895, at the time this treaty of Peace and Friendship and this supplemental protocol were drawn, the Government of Chile and Bolivia not only recognized the validity of the Wheelwright contract, but the Government of Chile definitely and specifically undertook to satisfy and discharge for Bolivia the indebtedness recognized by the Wheelwright contract, and it was expressly and specifically stated in the memorandum attached to and forming a part of the supplemental protocol of May 28, 1895, that the value of the principal of the debt of the Wheelwright contract amounted to 835,000 bolivianos and that such principal sum also drew interest. While this treaty seems never to have been ratified by the Bolivian Congress, it was ratified by the Chilean Congress, and must therefore be considered as expressing what the Government of Chile at that time considered to be due upon this debt.

So it is apparent that not only was there at this time, 1895, no arbitrary limitation to be placed upon the amount which should be paid in liquidation of the debt recognized and provided for by the Wheelwright contract, but on the contrary the instrument signed at this time distinctly recognized that said Wheelwright contract called for the payment of 835,000 bolivianos and that under the Wheelwright contract this sum drew interest.

On December 9, 1895, a further and supplemental protocol was signed at Sucre by His Excellency Don Juan G. Matta, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Chile, and Dr. Don Emeterio Cano, Minister of Foreign Relations of Bolivia, "with the object of fixing the conditions and obligations consigned in the Treaties of the 18th of May of the present year and in the Supplemental protocol of the 28th of the same month," which provided in Article 5 "That Bolivia does not recognize liabilities or responsibilities of any kind attaching to the territories that she shall transfer to Chile."<sup>a</sup> Since in Article 2 of the Treaty of Peace and Friendship of 1895 the credit of Pedro Lopez Gama was specified as "among the debts which encumbered the Bolivian Littoral," and it is therefore clear that at this time the two Governments recognized and agreed that the Government of Chile should assume and pay in its entirety the Alsop claim.

On April 20, 1896, the representatives of the two Governments signed another and further protocol which provided, Article 2, that "the Government of Bolivia shall submit to the approval

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<sup>a</sup> II Appendix, p. 458.

of the Congress of that Republic the Protocol relative to the liquidation of debts signed at Santiago on the 28th of May, 1895, as also the explanation to which the preceding article refers, defining the provisions of Article 4 of the Protocol of 9th December, 1895."<sup>a</sup>

It will thus be observed that up at least until April, 1896, neither Government entertained, at least so far as is shown by their treaties and protocols bearing upon the subject, any thought but that the full amount of the debt called for by the Wheelwright contract, including principal and interest, was legally and properly due to the claimants.

However, in 1901, the Government of Chile succeeded in having the United States and Chilean Claims Commission dismiss (by a majority decision) this claim for want of jurisdiction, on the ground, as has been already pointed out, and as will be more fully discussed hereafter, that Alsop & Co. was a Chilean citizen. There follows in the wake of this decision an evident disposition on the part of Chile, now for the first time, to limit, so far as it might now be able, the extent of the liability upon this debt, which she had, as above set forth, repeatedly been prepared to assume to its fullest extent. Accordingly it was provided in Article 5 of the Treaty of Peace and Friendship between the two Governments, signed at Santiago on October 20, 1904, as follows:

"Article 5. The Republic of Chile devotes to the final cancellation of the credits recognized by Bolivia, for indemnities in favor of the Mining Companies in Huanchaca, Oruro and Corocoro, and for the balance of the loan raised in Chile in the Year 1867 the sum of 4,500,000 pesos gold of 18 pence payable at the option of its Government in cash or in bonds of its foreign debt valued at their price in London on the day on which the payment is made and the sum of 2,000,000 pesos in gold of 18 pence in the same form as the preceeding for the cancellation of the credits arising from the following obligations of Bolivia:—the bonds issued, i. e. the loan raised for the construction of the railroad between Majillones and Caracoles according to the contract of July 10, 1872; the debt recognized to Don Pedro Lopez Gama represented by Messrs. Alsop & Co., surrogates of the former's rights; the credits recognized to Don John G. Meiggs, represented by Mr. Edward Squire, arising from the contract entered into March 20th, 1876, for renting nitrate fields in Toco, and lastly, the sum recognized to Don Juan Garday."<sup>b</sup>

At the time this treaty was signed, the debt, principal and interest, under the Wheelwright contract amounted to approximately 2,000,000 bolivianos.

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<sup>a</sup> II Appendix, p. 459.

<sup>b</sup> I Appendix, p. 440.

The Government of Bolivia, evidently fully realizing that it would not be possible for it, a debtor, thus to discount by an arrangement with a third party, and a stranger, the obligation due from Bolivia to its creditors, and further fully realizing that should such sum prove insufficient to discharge the various obligations for the payment of which it was intended thus to provide Bolivia would still be responsible for whatever obligations was due upon such credit obligations, secured from the Government of Chile a statement that the latter Government would save harmless the Government of Bolivia from any further reclamations which any of the claimants, specified in the treaty, might make against Bolivia.

This arrangement was accomplished by means of secret notes which were exchanged between the respective representatives of the two Governments at Santiago on October 21, 1904, which notes are in the following terms:

“LEGATION OF BOLIVIA,

“Santiago, October 21, 1904.

“MR. MINISTER: The Government of Bolivia agrees with Your Excellency's Government on the necessity of determining the purport of the wording of Article 5 of the Treaty of Peace and Friendship signed to day by Your Excellency on behalf of the Government of Chile and by the undersigned in representation of the Government of Bolivia.

“Both in regard to the claims of the Corocoro, Huanchaca, and Oruro companies and of the bond holders of the Bolivian loan of 1867 which were being paid out of 40 per cent of the receipts of the Arica Custom House, and *in regard to the claims against Bolivia* of the bond holders of the Mejillones railroad, *of Alsop and Co. (Assignees of Pedro Lopez Gama)*, of the estate of Juan Garday, and of Edward Squire, *it has been agreed that the Government of Chile shall permanently cancel all of them, so that Bolivia shall be relieved of all liability, the Government of Chile being obligated to answer every subsequent claim presented either by private means or through diplomatic channels, and considering itself liable for every obligation, bond or document of the Government of Bolivia relating to any of the claims enumerated, Bolivia's liability being entirely eliminated for all time and the Government of Chile assuming all liabilities to their full extent.*

“My Government desires that Your Excellency may be pleased to state to me, on behalf of the Government of Chile, whether this is the purport which it has given to article 5 of the Treaty of Peace and Friendship signed to day between the representatives of the two Governments.

“I avail myself of this opportunity to renew to Your Excellency the assurances of my high and distinguished consideration.

“(Signed.)

A. GUTIERREZ.

“To His Excellency Mr. EMILIO BELLO C.,

“Minister of Foreign Relations, City.

“A true copy.

“JOSE SALINAS,

[SEAL.]

“Chief Clerk of Foreign Relations”<sup>a</sup>

"REPUBLIC OF CHILE  
"MINISTRY OF FOREIGN RELATIONS.

"No. 1008.

"Santiago, October 21, 1904.

"MR. MINISTER: In reply to the note which Your Excellency addressed to me on this day I take pleasure, in compliance with your request, in defining the purport which this Chancellery assigns to clause 5 of the Treaty of Peace and Friendship signed to day by Your Excellency in representation of the Government of Bolivia and by the undersigned on behalf of the Government of Chile.

"My Government considers that the obligation which Chile contracts by Article 5 of the said Treaty comprises that of arranging directly, with the two groups of creditors recognized by Bolivia, for the permanent cancellation of each of the claims mentioned in said article, thus relieving Bolivia of all subsequent liabilities.

"It is consequently understood that Chile, as assignee of all the obligations and rights which might be incumbent on or pertain to Bolivia in connection with these claims, shall answer any reclamation which may be presented to Your Excellency's Government by any of the parties interested in the said claims.

"I renew to Your Excellency the assurances of my highest and most distinguished consideration.

"(Signed.) EMILIO BELLO C.

"To His Excellency Mr. ALBERTO GUTIERREZ,

"[SEAL.] E. E. & M. P. of Bolivia." <sup>a</sup>

It is not believed that any reasonable interpretation of these notes, which from their nature must be regarded as a part of this treaty, can be made which does not lead inevitably to the conclusion that while the Government of Chile, and perhaps the Government of Bolivia, intended that if possible the various obligations specified in Article 5 of the Treaty of 1904 should, if such an arrangement were possible with the claimants, be met from and out of the two million pesos specified in this article, yet if it should prove that the claimants or any of them should refuse to accept an arbitrary reduction of their claims and therefore that such complete discharge was not possible from the sum so set apart, that then and in that event the Government of Chile should answer in full any other and further demand which might be made for or in behalf of any of the obligations specified in this article.

In view of these facts and circumstances, it is difficult to regard as entirely an ingenuous expression of his well-considered views the explanation regarding this matter which was given by Señor Puga Borne to the American Chargé, Mr. Janes, as set forth in the latter's despatch of August 5, 1907, when the Chilean Minister of Foreign Relations stated that—

"the sum stipulated did not measure *merely* the amount Chile was willing to advance for certain rights and privileges given her by

Bolivia. This sum, he said, has been fixed for the satisfaction of the claims *after a study* of each one of these claims had been made. Then it was decided to provide for the *pro rata* division because it was discovered that the real value of the claim bore a fixed relation to the face value of the claim, which relation was equivalent to that borne by the 2,000,000 pesos to the sum total of the face value of the claims. Therefore, the sum which fell to Alsop and Company in satisfaction of their claim was believed by Chile to be the amount to which the claimant was entitled according to the dictates of justice."<sup>a</sup>

It must therefore be said that in view of all of these unlimited undertakings in which both principal and interest were recognized as due and payable and in view of the undertaking of the Treaty of 1904, as supplemented, amplified, and explained by the "secret notes" of October 21, 1904, the Government of the United States rests confident in the belief that it can not be successfully contended that the Government of Chile has not become fully responsible for the obligation incurred by the Government of Bolivia through the contract of December 26, 1876, by and between itself and Mr. John Wheelwright.

Indeed, that there is under these formal treaties and protocols above set forth an obligation running from the Government of Chile to the Government of the United States, for and in behalf of the claimants in this case, has been over and over again recognized and affirmed by the Government of Chile.

As early as June, 1892, the Minister of Foreign Relations of Chile unequivocally affirmed "that the claim of Alsop & Co. *figured among the liabilities that the Government of Chile engaged to pay for the accounts of Bolivia.*"<sup>b</sup>

Later, under date of October 13, 1897, the Minister for Foreign Relations of Chile, in a communication to the American Minister at Santiago, stated that

*"Chile by the Treaty of Peace with Bolivia of May 18, 1895, bound herself to satisfy various credits pending against the Government of Bolivia, amongst which was that of the house of Alsop & Co."*<sup>c</sup>

Still later, on July 2, 1904, the Minister of Foreign Relations of Chile assured the Minister of the United States that—

*"In this respect, it corresponds to me to reiterate to Your Excellency that the Alsop claim is included among the other claims for credits weighing on the Bolivian Coast, the payment of which will be assumed by Chile on the terms to be established in the respective treaty at the close of the negotiations at present going on towards that object between the Governments of Chile and Bolivia."*<sup>d</sup>

<sup>a</sup> I Appendix, p. 109.

<sup>c</sup> P. 101, supra.

<sup>b</sup> P. 99, supra.

<sup>d</sup> P. 103, supra.

Finally, the Government of Chile has, since 1904, repeatedly recognized her obligation, under that treaty, to meet the claim represented by the claimants in this case, by making repeated offers in settlement thereof, which offers, because of the fact that the Government of Chile sought to discharge the obligation by a pro rata assignment of the two million pesos, instead of fully meeting the obligation as required by the secret notes above quoted, the Government of the United States was obliged to decline. The first of these offers was made in December, 1903, while the 1904 treaty was yet pending. At this time an offer was made of 954,285 Chilean pesos of 18 pence. The Department of State declined to regard this sum as meeting the equities of the claimants. On December 9, 1904, the Minister of Chile at Washington left with the Solicitor for the Department of State a memorandum indicating that the pro rata share of the claimants in the two million pesos provided for by the Treaty of 1904 amounted to 524,333 Chilean pesos, or about two-thirds of the amount originally offered in settlement of this claim.

In the same month (December, 1904) the Government of Chile through its accredited representative made to the claimants a direct offer of settlement for the sum of 524,333 Chilean pesos, the acceptance of which the Department declined to urge. This offer was repeated on August 1, 1907,<sup>a</sup> save that there was added to the sum above named a certain amount for interest. On April 9, 1908, this offer was again renewed.<sup>b</sup>

Thus, it is entirely clear that it stands admitted by the Government of Chile that under the various treaties and protocols above set forth that Government must meet this obligation, and the only question which can exist between the two Governments under the admissions thus made by the Government of Chile is the question of amount, i. e., is the Government of Chile under obligation to the Government of Bolivia, and to the Government of the United States as a beneficiary, to satisfy this claim in its entirety, principal and interest, or is that liability limited to the claimants pro rata share of the sum named in Article 5 of the Treaty of 1904? The position of the United States is that, having in mind all of the precedent treaties and protocols passing between the two Governments in which the debt was unlimited, and having in mind the secret notes above set forth, as to the meaning of which there can, it would seem, be no reasonable doubt, the Government of Chile

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<sup>a</sup> I Appendix, p. 91.

<sup>b</sup> I Appendix, p. 142.

is obligated to satisfy in its entirety, principal and interest, the obligation which was recognized and imposed upon the Government of Bolivia by the Wheelwright contract of December 26, 1876.

It is not without interest on this point to note that notwithstanding the Government of Chile has insisted that her obligation was limited to the claimants pro rata share of the two million pesos specified in Article 5 of the Treaty of 1904, and in spite of the fact, at the same time, that her duly accredited representative has stated that the Government of Chile had no evidence whatsoever going to show that the full sum called for by the contract, principal and interest, was not legally and equitably due, yet the Government of Chile has repeatedly refused to pay to the claimants their pro rata share of this two million pesos specified in Article 5 of the Treaty of 1904, unless and until the claimants gave to the Government of Chile an acquittance of the entire debt and obligation. It is difficult to explain this attitude of the Government of Chile on any other theory than that it recognizes that its obligation under the treaty is fully and specifically to meet and discharge the whole debt due under the Wheelwright contract.

Moreover, as clearly appears from the correspondence between the United States and Bolivia, set forth under Point I, Sub-Point C, C3, *supra*, the Government of Bolivia has time and again insisted that the obligation of Chile to satisfy this debt in its entirety was perfect and complete.



### *Sub-Point C.*

The Government of Chile is liable to the Government of the United States for such indebtedness, principal and interest, due under the Wheelwright contract, because of many solemn diplomatic undertakings and agreements made and repeatedly renewed by the Government of Chile directly to the Government of the United States, and based upon ample consideration.

### *Prefatory Summary.*

A discussion of this point will show that in 1879, in a circular note addressed to the representatives of various governments, the Government of Chile assured those representatives that each citizen of their respective governments would "find in the territory where the Chilean law is now ruling again, all sorts of guarantees in their persons and interests." In 1884 the President of Chile assured the American Minister at Santiago that the Government of Chile "would honorably settle every claim upon it, which might be shown to be founded in justice and entail an obligation upon the Government under the law of nations," but entreated the Minister to "postpone any further action in the case, until such time as the definite arrangement with her opponents will leave Chile free to consider the questions growing out of the rights of neutrals."

The diplomatic promise and undertaking thus given to adjust American claims was repeated in the correspondence passing between the two Governments in December, 1884, and in February, 1885, as well as in November, 1890. In June, 1892, a specific promise was made to settle the Alsop claim, principle and interest, and this promise to settle the claim was repeated and renewed in October, 1896, and October, 1897.

In the proceedings before the United States and Chilean Claims Commission in 1901 a promise to settle the Alsop claim was formally stated by the Agent of Chile before that Commission

and this promise was incorporated in the decision of the Commission. In 1903 the Government of Chile again informed the American representative at Santiago that upon the conclusion of the treaty of peace between Chile and Bolivia, the Government of Chile would undertake to pay the Alsop claim, and this undertaking was repeated in 1904.

It is clear that these various diplomatic undertakings of the Government of Chile to pay this obligation were of such a character as to constitute, had the transaction been between private parties, an enforceable contract under the principles both of the common and the civil law.

Moreover, it is entirely clear that these undertakings thus formally given constituted a diplomatic agreement of the sort which various arbitral tribunals have held constituted an inviolable international contract which should be met by the country incurring the obligation.

It is also clear from the writings of authorities upon international law, that such an obligation must be suitably and honorably kept in order that there may be a proper observance of the good faith which must exist between sovereign nations.

#### *Discussion.*

But not only does the obligation of Chile to meet and discharge the debt (with interest) which is recognized and set forth in the contract of 1876 arise by reason of her repeated promises so to do made to the Government of Bolivia, the United States being the beneficiary under these promises, and not only has the same obligation become perfect by reason of the wrongful and confiscatory appropriation to her own uses by Chile of the money specifically set apart and appropriated by the Government of Bolivia to the payment of this debt—but the obligation fully and fairly to meet whatever should be due under the terms of the Wheelwright contract has been repeatedly made and renewed by the Government of Chile to the Government of the United States through its diplomatic representatives, as well as by the formal and solemn undertaking before the International Claims Commission to which the Government of the United States and the Government of Chile had referred their various claims for adjudication. How fully and accurately the facts bear out this statement will be seen from the following résumé of the various transactions to which reference is herein made.

*The General Undertaking of 1879.*—As has been already pointed out, the Government of Chile occupied, without previous declaration of war, the Bolivian port of Antofagasta on February 14, 1879. Before the outcome of the war could be definitely foreseen, and while the Government of Chile was yet in a position not to ignore the rights of neutrals in the territory which she was overrunning, and while she was still taking measures calculated to allay suspicion regarding her ultimate purpose, the Minister of Foreign Relations of Chile issued a circular note to the representatives of the Powers having legations at Santiago, in which the Minister, after making certain preliminary observations, gave the following solemn assurance:

“I need not assure your Excellency that your fellow countrymen will find in the territory in which the laws of Chile have once more resumed their sway every guaranty for the protection of their persons and interests.” <sup>a</sup>

The United States, in common with the other Governments, certainly had the right to assume, and act upon the assumption, that by giving this undertaking Chile intended to live up at least to the obligations imposed by the generally accepted rule and precedents of international law, and the Government of the United States did so act.

*The General Undertaking of February, 1884.*—During the same year, John Stewart Jackson, acting as attorney in behalf of John Wheelwright, liquidator of Alsop & Co., formally presented to the Minister of Justice a petition setting forth the grievances suffered by Wheelwright in connection with the application of the Chilean mining laws to the Bolivian Littoral. In dismissing the petition, by referring the claimant to the courts of Chile, the Minister, under date of October 18, 1882, made the following significant remark—

“*That the first of the objects to which this petition is directed points towards a diplomatic claim, which, although not absolutely formulated, is at least insinuated, and that claims of this class do not fall under the action of the Ministry of Justice.*” <sup>b</sup>

On the 19th day of May, 1882, the court of second instance at Antofagasta, in passing upon the questions at issue regarding the

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<sup>a</sup> I Appendix, p. 263.

<sup>b</sup> II Appendix, p. 150.

mine *Justicia*, justified its decision by citing among other provisions of the Chilean code that provision which stipulates that "Possessions situated in Chile are subject to the Chilean laws, although their owners be foreigners and do not reside in Chile." <sup>a</sup>

Inasmuch as Mr. Wheelwright had already prosecuted a number of suits in the Chilean courts, in each of which, as already pointed out, the Chilean courts had decided against him, he finally adopted and acted upon the *quasi*—suggestion above made by the Minister of Justice, and prepared a memorial to the American Minister in which, as an American citizen, he petitioned his Government for and in behalf of the American claimants that the intervention of his Government might be exercised in their behalf in order to secure the settlement of this claim.

All but simultaneously with this action of Wheelwright, the American Minister at Santiago took up for consideration with the President of Chile the question of the settlement of the claim of Mr. E. S. DuBois (an American citizen) against Chile. In the course of the discussion between the President of Chile and the American Minister the matter of general adjustment of claims was taken up, and the President of Chile gave the following assurance and made the following request:

*"The Government of Chile would honorably settle every claim upon it, which might be shown to be founded in justice, and entail an obligation upon the Government under the law of nations; that as regarded claims in particular, other than those provided for by special claims conventions, he did not think they ought to be pressed until Chile had actually closed the war; that as yet the Peruvians had not ratified the treaty of peace, and Bolivia would make no definite treaty until after the pending Presidential election; that everything promised a permanent settlement within the next four or five months, between all the belligerents, and that then the real business of arranging accounts, etc., should properly begin. In conclusion he requested me (the American Minister) to postpone any further action in the case, until such time as the definite arrangement with her opponents would leave Chile free to consider the questions growing out of the rights of neutrals, which as before said, cannot be very long. The President was very cordial, and I left with the conviction that his government would honorably arrange the claim in accordance with the principles of law and equity.*

*"Under the circumstances and in view of the situation, there seems to be much reason in the President's request; and in any event there is nothing further to be done until the time indicated shall have expired."* <sup>b</sup>

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<sup>a</sup> See II Appendix, pp. 119 and 229.

<sup>b</sup> I Appendix, p. 41.

*The General Undertaking of December, 1884.*—Later, under date of October 6, 1884, the American Minister, in submitting to the Government of Chile a list of claims (among them the claim of Alsop & Co.), made use of the following language:

*"With a feeling of profound friendship for Chile and appreciating the difficulties in which the Government was placed during the earlier part of the last quarter of a century, my Government has contented itself with simply presenting them (American claims) to Y. E.'s Government for consideration, feeling entirely satisfied to await the arrival of a more auspicious moment, when the high sense of justice which has always characterized Y. E.'s Government, would certainly bring about their settlement upon an equitable basis."*<sup>a</sup>

Subsequently, on December 6, 1884, in the course of a conversation between the Minister of Foreign Relations and the American Minister at Santiago, concerning the negotiation of a claims convention between the United States and Chile, the Chilean Minister indicated the unwillingness of Chile to enter into any other claims conventions. To this statement the American Minister said:

"In that case, Mr. Minister, the note addressed by myself to you, under date of October 6th, proposing a claims convention; upon the stipulations mentioned in my note of that date, to which I have been expecting a reply, is already answered. He quickly said to me 'No, I have not had time to study this case, and with your Government it is altogether a different thing, as I am quite confident that none but legitimate claims will be tolerated by your Government.'"

*The General Undertaking of February, 1885.*—Under date of March 16, 1885, the American Minister at Santiago reported as follows regarding the arrangements for the settlement of American claims:

"Feeling uneasy about the unusual delay in replying to my note of Oct. 6th, ult., proposing a Convention, as also at the turn affairs have taken since the practical recall of Señor Lopez Netto, already reported in my despatches, I went to Valparaiso during the latter part of February, to seek an interview with the Foreign Minister upon the subject of our claims. I found that the latter gentleman had gone to the southern part of Chile, and that he would not return for a month. I then called upon the President, and also upon Señor Balmaceda, Minister of the Interior, who, under the Chilean law and usage, is the Premier of the Cabinet, taking the Presidential Office temporarily, in case of the death of the Chief Magistrate of the nation. Both promised me that, immediately upon their return to Santiago, some definite shape should be given to our matter. Señor Balmaceda went farther than this, and said that, he was confident his Government would consent to an amicable arrangement which would

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<sup>a</sup> I Appendix, p. 42.

result in naming a round sum to indemnify our claimants, and at the same time avert the expensive machinery of a formal claims-tribunal.”<sup>a</sup>

Owing to the difficulties experienced by the Chilean Government in settling its claims with other powers, the American Minister consistently refrained from pressing the American claims upon the Chilean Government. In reporting upon this matter under date of May 3, 1888, he stated that in a conversation between himself and the President of Chile he had informed the President that—

“My intention was to have a conversation with him (the newly appointed Minister of Foreign Relations) upon the subject of the claims of American citizens resulting from the war with Peru. It was also my intention to mention the matter to Your Excellency, in order that you might learn directly the views of my Government, with the hope that the new Minister might be prepared to discuss the matter fully, when I should have the honor to call on him for that purpose.

“The Administration of President Cleveland, I said, has abstained from presenting these claims for consideration, from a desire not to embarrass the Government of Chile while negotiations were pending with European Governments for the settlement of similar claims, but now that these have terminated by settlement, my Government, naturally solicitous for the interests of its citizens, who for some time have been pressing their claims upon its attention, would like to negotiate for the appointment of a Commission for their adjustment believing also that such a settlement would promote the good relations existing between the two Governments.”<sup>a</sup>

*The General Undertaking of November, 1890.*—In November, 1890, the matter of the settlement of American claims against Chile was brought to the attention of the Government of Chile by the American Minister at Santiago, and in the course of a conversation between the Minister and Señor Don Domingo Godoy, upon this subject, the American Minister reports as follows:

“He informed me that the Ministerio had already arranged all its datum in opposition to the claims, and requested that I should furnish the proofs in all of the cases so that they might be sent to the Fiscal or law adviser of the Government for his examination and report, after which, he said, his Government would be prepared to enter into an arrangement for the settlement of such of them as might appear to possess merit.”<sup>a</sup>

*The Specific Undertaking of June, 1892.*—On June 3, 1892, the Minister of the United States at Santiago addressed the following note to the Minister of Foreign Relations of Chile, in which a

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<sup>a</sup> I Appendix, p. 51.

specific demand is made for the payment of the Alsop claim, contract and tort:

"Sir, in view of the pending negotiations between the government of Y. E. and that of the Republic of Bolivia with the object of establishing and confirming between the two countries a definite treaty of peace, a result which, on the part of my government, I sincerely hope may be speedily arrived at, to the mutual and entire satisfaction of both Chili and Bolivia, I trust Y. E. will not consider it inopportune to call the attention of Y. E. government to the claim of the representatives of the United States Commercial House of Alsop and Company, formerly of Valparaiso, the particulars of which Y. E. will find set out in my note of 30th September, 1890, addressed to the Ministerio of Y. E. The claim is marked No. 2 in the second series of claims mentioned in said note and is described as the claim of the "Representatives of the late John Wheelwright, liquidator of Messrs. Alsop and Company of Valparaiso."

"As Y. E. will perceive the claim is for a debt of eight hundred and thirty-five thousand Bolivian soles (\$835,000) with interest at the rate of five per cent per annum from the year 1876; which debt was solemnly acknowledged by the Government of Bolivia and the payment secured by lien upon the income of the Northern Custom House over and above the sum of four hundred and five thousand soles (\$405,000) per year.

"Upon the occupation of Tacna and Arica as the consequence of the war between Chili, and Peru and Bolivia, this arrangement was arbitrarily set aside by the government of Chili to the great loss and suffering of the surviving partners and representatives of the House of Alsop and Company.

"There are also questions with regard to rights in certain mining property, situated in the territory occupied as above stated, and transferred by the government of Bolivia to the representatives of Alsop and Company as further security in connection with same debt and interest thereon which rights have been refused recognition by the Tribunals of Chili.

"Of these rights under a lawful contract the government of Y. E. was duly informed, anterior to the signing of the convention of truce with Bolivia, in a petition presented to Y. E. government, by Mr. John Stewart Jackson, attorney for the claimants, dated Valparaiso, September 11th 1882.

"At the urgent request of His Excellency President Santa Maria conveyed to the United States Minister, Mr. Logan, in February 1884, the consideration of the claims of United States citizens arising out of the conflict between Chili, Peru and Bolivia, was deferred, in the words of His Excellency: 'Until such time as a definite arrangement with her opponents would leave Chili free to consider the questions growing out of the rights of neutrals.' From considerations of profound friendship toward the Chilean Government and the Chilean people my government has, from time to time up to the present, postponed these claims although many of the claimants have been suffering great hardships on account of their losses including some of those interested in this particular one. In view of these considerations I submit to Y. E. that in whatever definite arrangement may be made between the government of Chili and that of Bolivia this clearly acknowledged liability to the Representatives

*of the House of Alsop and Company should in right and justice, be taken into account and definite provision be made for its early liquidation a result which, in full reliance upon the high appreciation of international honor which characterizes the government of Y. E. I sincerely hope to see accomplished.*

"I shall be prepared to submit to Y. E. in the course of a very few days all of the documents in the case.

"Renewing to Y. E. the assurances of my high consideration and esteem I have the honor to remain.

"Y. E. obedient servant,

"(Signed)

PATRICK EGAN." <sup>a</sup>

Under date of June 11, 1892, the American Minister reported to the State Department further progress which he had made in the case of Alsop & Co. in the following language:

"SIR: I have the honor to refer to my No. 306 of 3d instant enclosing a note addressed by me to the Minister of Foreign Relations in regard to the claim of the Representatives of the United States Commercial House of Alsop and Company, otherwise known as the 'Wheelwright Claim,' and I beg to say that on yesterday I had an interview on the matter with the Sub-Secretary of Foreign Relations, when he told me that in consequence of the change of Ministry it was not possible, up to that time, to send a written reply to my note of the 3d instant. *He assured me, however, that in the definite treaty of peace now being negotiated between Chili and Bolivia, under which Bolivia will cede to Chili all territorial claims upon Arica and Tacna and Chili will undertake the payment of certain of the exterior debts of Bolivia, the payment of this debt to the Representatives of Alsop and Company will be undertaken by Chili.* The validity of the debt to Alsop and Company has been fully admitted by the Bolivian Government in a memorandum with the Junto de Gobierno in Iquique, and in the course of the present negotiation I shall endeavor to obtain an undertaking for its payment within a specified time by the government of Chili.

"In a very short time more I will be able to place before the Chilean Government all the proofs in the remaining claims arising out of the war between Chili and Peru." <sup>a</sup>

Under date of June 22, 1892, the American Minister forwarded to the Department a communication and its enclosures, which read as follows:

"I have the honor to refer to my Nos. 306 and 310 of 3rd and 11th instants in reference to the claim of the representatives of Alsop and Company formerly of Valparaiso, known as the 'Wheelwright Claim,' and now beg to enclose copy and translation of a note received from the Minister of Foreign Relations (enclosures Nos 1 and 2) dated 18th instant in which on the part of his government he practically assumes responsibility for the payment of the principal debt \$835,000 Bolivianos in accordance with a protocol entered into in Iquique in May 1891; but inasmuch as Bolivia had not in

<sup>a</sup>I Appendix, p. 58.



said protocol recognized the question of interest due on said debt from 26th December 1876 at the rate of five per cent per annum, amounting to \$650,000 Bolivianos, he leaves the payment of said interest an open question. *I have accordingly addressed a note under this date, enclosure No. 3, giving for the information of the Minister particulars of the contract entered into by the government of Bolivia and reduced to public record at La Paz the 26th December 1876 recognizing this interest in the same way as the principal debt which the Sub-Secretary of Foreign Relations assured me would be entirely satisfactory.*

"In my No. 310 of 11th instant I said that in the definite treaty of peace now being negotiated between Chili and Bolivia the latter would cede to the former all territorial claims upon Arica and Tacna. This I beg to correct. In the proposed treaty Bolivia will cede to Chili all territorial claims upon the province of Antofagasta. Inasmuch as the definite ownership of Tacna and Arica will only be decided by vote of the people next year in accordance with the treaty between Chili and Peru, nothing can now be done with regard to them but it is understood that Chili has held out hopes that should those provinces be definitely annexed to Chili she will then cede to Bolivia some portions of the territory in order to give to the latter an outlet to the sea."<sup>a</sup>

*"Enclosure No. 2 in No. 314.*

[Translation of Enclosure No. 1]

No. 1284

"REPUBLIC OF CHILE,

"DEPARTMENT OF FOREIGN RELATIONS.

*"Santiago 18th June 1892.*

"SIR: I have had the honor to receive Y. E.'s communication dated 3d instant in which Y. E. 'in view of the pending negotiations between the Government of Bolivia and that of Chile to establish a definite treaty of peace between the two countries' calls the attention of the government of Chile to the claim of the representatives of the American Commercial House of Alsop and Company, hoping it will not be considered inopportune by the undersigned.

"Y. E. refers to your communication of 30th September 1890, in which this claim is numbered 2 among those mentioned in said note, under the name of the late John Wheelwright, liquidator of the said House of Alsop & Co. asking the payment of a sum amounting to \$835,000 Bolivian pesos with an annual interest of 5 per cent from 1876.

"Y. E. states that this debt was solemnly ratified by the government of Bolivia in the form mentioned and that, as a consequence of the occupation of Tacna and Arica by the Chilean forces the agreement celebrated with Bolivia 'was arbitrarily set aside by the government of Chile.'

"Y. E. adds some data relating to the matter, the settlement of which Y. E. has been pleased to state the government of Y. E. has several times postponed out of considerations of friendship for the government and people of Chile, and closes asking the govern-

<sup>a</sup> I Appendix, p. 61.

ment of Chile to take the claim into consideration in whatever arrangement may be celebrated with Bolivia.

"In reply, I have the pleasure to inform Y. E. that in the preliminary Protocol of a Treaty of Peace between Chile and Bolivia, ratified by the undersigned in the city of Iquique, as Minister of Foreign Relations of the Constitutional Government, the claim of Alsop and Company which Y. E. has supported, for the sum indicated by Y. E.—835,000 Bolivian pesos—figured among the liabilities that the government of Chile engaged to pay for account of Bolivia.

"Regarding the payment of interest to which Y. E. refers, the government of the undersigned awaits what may be done in the negotiation that is to follow by the government that recognized the principal obligations; the Government of Chile, which only assumes the obligations of a neighboring and friendly country will endeavor to attend to this part of the claim once the government of Bolivia pronounces upon its legitimacy or validity, confining myself, as a proof of deference to the government of Y. E. to offering the assurance that I will carefully take into account the resolution that may be adopted by the government of Bolivia in relation to this point.

"Upon forwarding what has already been stated the undersigned is pleased that in the Protocol celebrated in Iquique in May 1891 the government of Chile had already taken into account the matter referred to in the esteemed communication of Y. E. to which I have the honor to reply.

"I avail, etc.

"(Signed.)

ISIDORO ERRAZURIZ.

The Envoy Extraordinary and Minister

Plenipotentiary of the United States of

North America, Mr. PATRICK EGAN.<sup>a</sup>

"Enclosure No. 3 in No. 314.

"LEGATION OF THE UNITED STATES,

"Santiago, Chili 22nd June 1892

"SIR: I have the honor to acknowledge the receipt of the attentive note of Y. E. dated 18th instant, in reply to mine of 3rd instant on the subject of the debt due from the government of Bolivia to the Representatives of the United States Commercial House of Alsop and Company, and I beg to express the sincere pleasure that it has afforded me to learn the cordial manner in which the indications conveyed in my note have been received in the Ministerio of Your Excellency and of the inclusion of the debt referred to in the preliminary Protocol entered into in Iquique between Chili and Bolivia, participated in by Y. E. as Minister of Foreign Relations of the Constitutional Government.

"For the purpose of enabling Y. E. to fix with precision this debt and to fully appreciate the validity of the claim for the interest thereupon at the rate of 5 per cent per annum from the 26th of December 1876 I have the honor to quote for the information of Y. E. the following passage from the Supreme Decree of the Bolivian Government made 24th December 1876, which is as follows: 'Primer—Se reconoco al expresado (Juan Wheelwright) representante

<sup>a</sup> I Appendix, p. 63.

de la casa Alsop y Compania el capital de ochocientos treinta y cinco mil bolivianos con el interes anual del cinco por ciento, no capitalizable, que carrera desde la fecha del otargamiento de la escritura de este contrato.'

"This contract was reduced to escritue publica in La Paz the 26th December 1876 before Patricio Barrera, 'Notario de Hacienda Gobierno i Guerra,' under the following title: 'Numero cuatro cientos diez—Transaction entre el Senor Ministro de Hacienda i Industria, Doctor Manuel Ignacio Salvatierra, en representacion de los intereses nacionales y el Senor Juan Wheelwright, socio i representante de los Senores Alsop y Compania de Valparaiso, para consolidar y amortizar sus credits pendientes con el estado,' and a full and certified copy of said Supreme Decree of 24th December 1876 and said escritura publica of the contract of 26th December 1876 is deposited in the archives of the Ministerio of Hacienda of Y. E. Government attached to a solicitude of John Stewart Jackson dated 11th September 1882 presented to said Ministerio in connection with this same case.

"Availing of this opportunity to renew to Y. E. the assurance of my distinguished consideration.

"I have the honor to remain,

"Y. E. obedient servant,

"(Signed.)                      PATRICK EGAN."<sup>a</sup>

It will be noted from the above correspondence (1) that at this time the Government of Chile clearly and without reservation undertook to meet whatever obligation the Government of Bolivia should pronounce as legal and binding under the Wheelwright contract; (2) that a principal sum of 835,000 Bolivian pesos "figures among the liabilities that the Government of Chile engaged to pay for account of Bolivia;" (3) that as to the interest, the Government of Chile would pay interest, provided the contract called for interest; (4) that the Under-Secretary of Foreign Relations, upon being shown the contract and the provision therein regarding interest, assured the American Minister that this would be entirely satisfactory upon that question.

In this connection it should not be lost sight of that for ten years the claim of Alsop & Co. had been continually pressed upon the Government of Chile; that in 1882 the question of the rights and titles of Alsop & Co. under the contract was fully presented before and discussed by the courts of Chile, and that in October, 1882, the question of the rights of Alsop & Co. was brought before the executive branch of the Chilean Government, which, after considering and studying the case, instructed the petitioner to "make good his claim before whom and in the form which he might deem con-

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<sup>a</sup> I Appendix, p. 64.

venient." From 1882 until 1892 the claim of Alsop & Co. was one of those claims the settlement of which the Government of the United States postponed after repeatedly calling the matter to the attention of the Chilean Government, out of consideration for the difficulties and embarrassments in which that Government found itself. In 1891 in the protocols signed between the Governments of Chile and Bolivia, this obligation, to quote from the Chilean Minister, "figured among the liabilities that the Government of Chile engaged to pay for account of Bolivia," the treaty expressly providing that this credit amounted to 835,000 bolivianos, and that this sum drew interest. Finally, in 1892, the Government of Chile made directly to the United States the unconditional promise set forth above. Up to this point there was never a suggestion from either the Government of Chile or the Government of Bolivia that the full amount called for by the contract was not equitably due and payable to the claimants in this case. Indeed, on the contrary, the exact sums called for by the contract with interest had been expressly recognized, and it can scarcely be supposed that the Government of Chile at the time it thus agreed with Bolivia and in addition obligated itself to the United States, had not investigated the claim and did not understand the basis upon which it rested. The Government of the United States, therefore, contends and maintains that under and pursuant to the above formal and solemn promise made by the proper officer of the Chilean Government to liquidate this claim under and in accordance with the terms of the contract between the Government of Bolivia and John Wheelwright, as liquidator for Alsop & Co., the Government of Chile has become finally and irrevocably obligated to the Government of the United States to satisfy this claim in accord with the terms of this promise thus freely, fully, and fairly given.

*The Specific Undertaking of October, 1896.*—On August 7th, 1892, Mr. Patrick Egan, the American Minister at Santiago, and Isidoro Errázuriz, Minister of Foreign Relations of Chile, negotiated a claims convention which provided for the settlement of claims of the citizens of either country against the other.<sup>a</sup> The Commission met in Washington on July 25, 1893, and the Alsop claim was one of the claims submitted to it for consideration and determination. The Commission concluded its sessions on April 9, 1894, on which date the Commission declared that "inasmuch

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<sup>a</sup> II Appendix, pp. 1-5.

as we have not been able to make such an examination of the voluminous testimony in this (the Alsop) case and of the many legal questions involved as would enable us to reach a satisfactory conclusion, we decline to render any judgment thereon." <sup>a</sup>

It was in defending this claim before this Commission that the Government of Chile for the first time since the matter was first brought to its attention, raised an objection regarding the nature of this claim, and it now did so notwithstanding that for more than a decade the claim had been pressed by the Government of the United States without question or complaint by the Government of Chile, and notwithstanding, as has been set out above, that the Government of Chile had specifically promised the Government of the United States to liquidate this indebtedness, principal and interest. The Government of Chile, through its agent, now advanced before the Commission the novel contention that Alsop & Co., was a Chilean citizen and therefore not American and not within the jurisdiction of the Commission.

Matters were left in this shape until, pursuant to instructions from the Department of State, the American Minister at Santiago again took up the matter with the Chilean Government and asked for settlement of the claim of Alsop & Co.

The American Minister, under date of October 10th, 1896, reported upon his instruction in the following language:

"In reply to the Department's No. 99, of August 10th last, enclosing a letter from the Hon. G. S. Boutwell, and instructing me to ascertain from the Government of Chile the proposed date of settlement of the claim of Alsop & Company, and whether by a treaty or by an understanding between the Governments of Chile and Bolivia the amount to be paid had been fixed, I have the honor to report that yesterday *I had a conversation on the subject with Senor Eduardo Phillips, under Secretary of Foreign Relations, who gave me the following information:*

"On May 28th, 1895 a protocol, supplementary to the treaties between Chile and Bolivia forwarded to the Department with my No. 85 of May 6, last, was signed. This protocol was approved by the Chilean Congress, in secret session, but is still awaiting the approval of the Congress of Bolivia, and has, therefore, not been published. It has an important bearing upon the claim assumed by the Chilean Government in accordance with the provisions of Article 2 of the Treaty of Peace and Amity, of May 18th, 1895.

"According to the memorandum presented by the Bolivian Minister at this capital which is regarded as part of the protocol, the amount proposed as a settlement of the claim of Alsop & Co. is, without calculating interest (*sin computar intereses*) eight hundred and thirty-five

thousand Bolivianos, of twenty pence, or nine hundred and fifty-four thousand, two hundred and eighty-five Chilean pesos.

"By article 3 of the protocol the Government of Chile, in order to settle the definite amounts to be paid, shall take into account the origin of the claims allowed (*el origen de cada credito*) as well as the data furnished by the Bolivian Minister in his memorandum.

"It is hoped that the protocol will be approved by the Bolivian Congress, which is now in session, in a few weeks. The Chilean Government cannot take up the question of the payment of the claims until this protocol has been approved and promulgated.

"On receiving the above information, I enquired of Senor Phillips whether it was to be understood that the terms of article 3 of the protocol gave to his Government the right of making a re-examination of the claims; and I stated that if this were the case, it was contrary to the impression existing in the minds of the claimants as well as to my own understanding of the matter. He replied that, in view of the large amounts to be paid, it was natural that his Government should desire to examine the papers on which the claims were based; but that he thought that as soon as the protocol was approved and promulgated, there would be no disposition to delay a settlement.

"The Bolivian Minister here, Senor Gutierrez, whom I saw this afternoon, and with whom I spoke upon the subject, also seemed to be of this opinion.

"As soon as the protocol is approved by the Bolivian Congress, I will again call the attention of the Chilean Foreign Office to the claim, with a view to obtaining some more definite assurance regarding its payment.

"In the meantime, I should be glad to be informed as to what attitude is to be taken upon the payment of interest, which, from the terms of Mr. Boutwell's letter, seem to be included in the claim.

"I have the honor to be, Sir,

"Your obedient servant,

"EDWARD H. STROBEL." <sup>a</sup>

It will be observed that, while at this interview the Minister for Foreign Relations suggested that the Government of Chile might desire to make a re-examination of the claim by way of assurance, no objection was taken or made to the contract itself, nor is there any indication that full payment should not be made in the amount for which the contract calls, principal and interest.

*The Specific Undertaking of October, 1897.*—The question was again presented in a definite way by correspondence which passed between the American Legation at Santiago and the Minister of Foreign Relations in October, 1897. Under date of the 13th of that month the Minister of Foreign Relations of Chile addressed the following note to the American Minister at Santiago:

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<sup>a</sup> I Appendix, p. 67.

"REPUBLIC OF CHILE  
"MINISTRY OF FOREIGN RELATIONS,

"Santiago, October 13, 1897.

"SIR: I have duly had the honor to receive Your Excellency's esteemed note of September 28th last, my reply to which I have delayed until now as I had to attend to matters which I could not postpone.

"In the said communication, referring to the memorandum which Mr. Simpkins, at that time Chargé d'Affaires ad interim of the United States of America, delivered to the Sub-Secretary of this Department, Senor Eduardo Phillips, Your Excellency requests me to advise you as to the attitude my Government at present proposes to assume towards the Alsop claim, and whether the understanding of my government of its engagements with Bolivia is of such a nature as to enable the Alsop claimants to come to a direct agreement with Chile on the basis of the Chilo-Bolivian liquidation.

"You add that, while making this enquiry, it is not the wish of the Government of the United States to be understood as suggesting that an arrangement of the kind indicated be entered into between Chile and the Alsop claimants; and you conclude by stating that as the United States holds that no proceedings under the Chilo-Bolivian Treaty can impair the jurisdiction of the proposed Americo-Chilean Commission of Arbitration to deal with the case on its merits, you advise me that your note is merely interrogatory in character.

"In reply, Mr. Minister, I have to say to Your Excellency, that notwithstanding my desire to reply to the questions which you have put to me, I find it absolutely impossible for me to advance any opinion on the subject.

*"Chile, by the Treaty of Peace with Bolivia of May 18, 1895, bound herself to satisfy various credits which were pending against Bolivia, amongst which was that of the House of Alsop and Company.*

"That obligation contracted by Chile has no force, however, as long as the treaty by virtue of which it was contracted is not definitely perfected. And as this requisite has not been complied with, inasmuch as the treaty cannot be perfected as long as our Congress does not approve, nor the Executive ratify, the Chilo-Bolivian protocols which have been submitted to the consideration of the former, it will easily be seen that any resolution that my Government might take regarding these credits would be inopportune and inefficacious.

"On the other hand, Mr. Minister, the credit of Alsop and company, like several others enumerated in the Treaty of May 18, 1895, will have to be the subject—as expressly established in the said Treaty—'of a special liquidation and detailed specification in a complementary protocol.'

"This circumstance alone would not permit me to advance an opinion of any kind regarding a credit which is subject to an ulterior liquidation.

"Please accept my sentiments of high and distinguished consideration.

"(Signed.)

R. SILVA CRUZ." <sup>a</sup>

*The Specific Undertaking of 1901 before the United States and Chilean Claims Commission.*—As was set forth in the Historical Résumé, the two Governments on May 24, 1897, by the Honorable John Sherman, Secretary of State of the United States, and Señor Don Domingo Gana, Chilean Minister at Washington, signed a supplemental convention, reviving the Convention of August 7, 1892, which had “failed, through limitation, to conclude its task,” it being provided that the revived Commission “shall be limited in conformity with the terms of the Convention and with the rules that governed its labors,” a certain claim specifically named being excepted.

The Agent of the Government of Chile renewed before the revived Commission the arguments of the Chilean Agent before the first Commission to the effect that, since Alsop & Co. was a partnership, registered under the laws of Chile, it was a Chilean citizen, and that therefore, notwithstanding that all of the partners were American citizens, and that the whole commercial venture, as well as the capital invested, was American, the claim did not fall within the terms of the convention, which stipulated for the adjudication of “all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of Chile.”

But, while the Agent of Chile made this contention before the Commission, he, at the same time, in order to induce the Commission to dismiss the same, made, in careful and well chosen but clear and specific language, the following announcement regarding the intentions of Chile with reference to the settlement of this claim:

“As is stated in the claimant’s brief, it is among the liabilities that the Government of Chile engaged to pay for the account of Bolivia. This explains exactly the situation of the claim. The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia, towards the claimant; and in order to induce the Bolivian Government to sign the definite treaty of peace which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and it is its position to day, and if Bolivia signs the treaty, the claim of Alsop and Company, as well as the other claims mentioned, will be promptly paid under the treaty engagement as a relief to Bolivia from the liabilities which that Government has incurred and for the account of Bolivia.”<sup>a</sup>

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<sup>a</sup> II Appendix, p. 569.



After due deliberation, the majority of the Commission, the American Commissioner dissenting in an able and powerful decision, decided in favor of the contention of the Chilean Agent, and dismissed the claim for want of jurisdiction, stating, however, that this was without prejudice to any rights which the claimant, or claimants, or Alsop & Co., or its liquidator, might have, either by diplomatic intervention, or before the Government of Chile, or the courts of Chile. In rendering this decision, the Commission, after discussing the arguments advanced by the Agents of the respective Governments, and after considering the precedents advanced by the Agent of the United States in support of his contention (one of which, the Cerruti case, was directly in point), concluded their opinion with the following statement:

"By this conclusion it is not denied that certain cases may arise (like the Cerruti case) in which redress may justly be granted by means of diplomatic intervention to an individual member of a society for injury to the partnership property. The demurrer is sustained wholly upon the ground that Alsop & Company, in liquidation, being a citizen of Chile, this Commission, under Article 1 of the Convention of 1892, has no jurisdiction to entertain the claim. The case is dismissed, therefore, without prejudice, however, to any rights which the claimant, or claimants, or Alsop & Company, or its liquidator may have, either by diplomatic intervention or before the Government of Chile, or the courts of Chile. Nor are the merits of the claim in any way prejudiced by this decision. According to the brief of the Honorable Agent of Chile, it is declared that this claim

"Is among the liabilities that the Government of Chile engage to pay for the account of Bolivia. \* \* \* The Chilean Government has always regarded it, and does still regard it, as a liability on the part of Bolivia towards the claimant; and in order to induce the Bolivian Government to sign the definite treaty of peace, which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty. This has always been the position of the Chilean Government, and is its position today, and if Bolivia signs the treaty, the claim of Alsop & Company, as well as the other claims mentioned, will be promptly paid under the treaty engagement, as a relief to Bolivia from the liabilities which that government has incurred and for the account of Bolivia."

"The claimant is, therefore, remitted for relief to the Government of Chile, whose assurances are thus given, and the case is dismissed.

"J. B. PLODA,

*"The Commissioner for Switzerland.*

"C. MORLA VICUNA,

*"The Commissioner for Chile." a*

*The Specific Undertaking of 1903.*—On June 12, 1903, as a result of an inquiry from the Department of State as to what progress had been made in the negotiations looking to the settlement of the Alsop case, the American Minister took up with the Chilean Foreign Office the question of the adjustment of this claim and reported to the Department the results of his interview and the assurances given to him thereat in the following cable:

[Paraphrase.]

Liquidation of all claims against Bolivia is assumed by Chile under the treaty, the signature of which is assured.<sup>a</sup>

In reporting upon the claim under date of October 27, 1903, the American Minister stated:

"I have the honor to acknowledge the receipt of the Department's No. 247, asking to be advised of the truth of the report, that the pending negotiations between Chile and Bolivia have been broken off, or postponed indefinitely, owing to the unwillingness on the part of Chile to assume all that is demanded by Bolivia in the way of indemnity.

"The report which reached the Department is not based upon facts. The negotiations are still proceeding, with every prospect of a satisfactory exit, and I was advised, no longer ago than three days, by the Minister of Foreign Relations, that he would soon be in a position to make a cash offer to the claimants of Alsop and Company, in satisfaction of this long pending claim. *The Minister informed me that he would make the tender directly to me, and that if the same was not accepted, the amount tendered would be handed over to Bolivia, and, the Alsop creditors, together with such others as might decline to accept a direct cash settlement with Chile, would be remanded to La Paz for the consideration of the Bolivian Government.*

"Whenever such tender is made, I will communicate with the Department by telegraph, asking for authority from the Alsop claimants to make settlement."<sup>b</sup>

*The Specific Undertaking of 1904 to Settle This Claim.*—On June 18, 1904, the American Minister at Santiago reported a conversation which he had with the Minister of Foreign Relations of Chile on the 13th of that month, at which interview the American Minister had with much emphasis commented upon the continuous delays that had characterized the negotiations in this case.

The American Minister reported the Minister of Foreign Relations as replying that he had every disposition to meet the demands of the claimants and the expressed wish of the United States, but that

<sup>a</sup> I Appendix, p. 78.

<sup>b</sup> I Appendix, p. 80.

the Government of Chile could not depart from the position which it had taken and to which it still adhered, i. e., that the payment of this claim is assumed by Chile contingent upon the signing of the definite treaty of peace and amity with the Government of Bolivia. According to the views of the Chilean Government, this was the strict and just construction of the Treaty of Ancon.

"The Minister stated, however, that the treaty with Bolivia would be signed and ratified within three months and that he would authorize me to state as much to my Government. He added, moreover, that as an evidence of his Government's desire to gratify the desires of the United States, the Alsop claim would be taken up immediately after the ratification of the Treaty with Bolivia, and given special, and even generous consideration."<sup>a</sup>

This conversation was confirmed in the following notes which passed between the American Minister and the Minister of Foreign Relations of Chile under the dates given:

*"June 21st, 1904.*

"Mr. MINISTER: Upon the 13th inst., I had the honor to confer with Your Excellency relative to the Alsop claim, and expressed to you after having submitted to your inspection the urgent telegram concerning the claim, just received from my Government, the pressing necessity for early consideration of this long pending obligation, and how greatly, decisive action by Your Excellency's Government, would be appreciated by the Government of the United States.

"Your Excellency's reply to the observations which I had the honor to make on this occasion, was, briefly, that the Chilean Government had held, and continued to hold, the claim of Alsop and Company, as an obligation payable by the Chilean Government, contingent only upon the signing of the definite treaty of peace and amity with Bolivia, Your Excellency adding moreover, that this treaty would, without any doubt, be signed and ratified by the Governments of Bolivia and Chile, within the term of three months, and that I might consider myself authorized to convey information to this effect, to my Government. *Continuing, Your Excellency was good enough to add, that immediately following the ratifications of the treaty, the Chilean Government would address itself to the consideration of the Alsop claim, and out of deference to the expressed wish of the Government of the United States, and the necessitous condition of the claimants, would give to it, special, just and even generous consideration.*

"Upon the same date of my interview with Your Excellency, I conveyed, by cablegram, to my Government, the substance of your statement, as recited above, and upon the 14th, I received the following reply:—'Express to Minister for Foreign Affairs the President's appreciation of assurances given and communicated by your cablegram. On this basis Department is confident the matter will be satisfactorily adjusted at the period named.'

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<sup>a</sup> I Appendix, p. 88.

"I avail myself of this opportunity, to renew to Your Excellency, the assurances of my most distinguished consideration and esteem, and beg to subscribe myself,

"Your Excellency's obedient servant,

"HENRY L. WILSON.

"His Excellency,

"Señor Don EMILIO BELLO CODECIDO,

"Minister of Foreign Relations."<sup>a</sup>

"Santiago, July 2nd, 1904.

"Mr. MINISTER: I have the honor to acknowledge the receipt of Your Excellency's note dated 21st ult., in which Your Excellency, referring to the conversation with the undersigned respecting the Alsop claim, transcribes to me the following cablegram sent by your Government to that Legation on the 15th of said month:

"Express to Minister for Foreign Affairs the President's appreciation of assurances given and communicated by your cablegram. On this basis Department is confident the matter will be satisfactorily adjusted at the period named."

"In this respect, it corresponds to me to reiterate to Your Excellency that the Alsop claim is included among the other claims for credits weighing on the Bolivian coast, the payment of which will be assumed by Chile on the terms to be established in the respective treaty at the close of the negotiations at present going on towards that object between the Governments of Chile and Bolivia. Only then will it be possible for the undersigned to give to the said Alsop claim the attention it deserves.

"I avail" &c &c \* \* \*

"(Signed)

EMILIO, BELLO C.

"His Excellency,

"HENRY L. WILSON, E. E. and M. P. of the United States of America."<sup>b</sup>

It will thus be observed that the Government of Chile has many times promised the Government of the United States in general terms fully to meet and satisfy the claims of American citizens against that Government and has on at least six occasions specifically promised the Government of the United States to meet the indebtedness recognized and provided for by the Wheelwright contract of 1876. It is difficult to see upon what ground the obligation thus repeatedly assumed in the most formal way by communications addressed through the proper diplomatic channels can be evaded or avoided and it would appear unnecessary to enter into any legal discussion to establish the fact that under these various promises thus formally and solemnly given, the Government of Chile has become absolutely and fully obligated to the Government of the United States to meet the indebtedness recognized by the Wheelwright contract. In order, however, that the matter may be made entirely clear, and that there may

<sup>a</sup> I Appendix, p. 80.

<sup>b</sup> I Appendix, p. 90.

be no shadow of doubt that even waiving for the moment the solemnity which must be attached to an international promise or undertaking, there still is in the undertakings above set forth such an obligation as would, had the transaction occurred between private parties of either Government, have bound such parties in a legal and binding contract, under the general principles of either the civil law or the common law—it seems desirable to set forth the following considerations:

That the contract would be legal and binding between private parties, if it had been formed under the rules of the civil law, is perfectly clear and obvious, since there was upon one side a promise, clearly and definitely expressed, to pay this obligation, and on the other side an acceptance of this promise and an action upon it, namely, a forbearance at that time further to press the matter for consideration. In view of the fact that under the civil law a consideration in the technical sense as known to the common law is not necessary to make a binding and effective contract, and that all that is necessary to make a contract is that there should be an intent to contract and a meeting of the minds, it can not be doubted that under the civil law this promise of the Government of Chile was of a kind and character definitely and legally to bind her to the payment of the debt which was thereby assumed. It is believed unnecessary to enter into any extended discussion of these principles, which are so well recognized, but the following authorities may be cited for the purpose of supporting the statements and contentions above made: Hunter's Roman Law, Book II; Leage's Roman Private Law, p. 262, et seq.; IV Phillimore's International Law (3rd ed.), pp. 491 and 496, et seq.; Howe's Studies in the Civil Law, p. 101, et seq. See also I Pothier on Obligations, p. 2, et seq.; Langdell's Summary of the Law of Contracts, p. 60 et seq. and p. 126, et seq.; *Pillans & Rose v. Van Mierop & Hopkins* (1765), 3 Burr., 1663.

But not only would the indebtedness as above set forth by Chile constitute, as has just been shown, a contract under the civil law, where no consideration in the technical sense is required, but this indebtedness would, under the strict technical rules of the common law, constitute a legal and binding contract, being based upon a sufficient and valid consideration. It will be observed that when this claim with others was first presented to the Government of Chile that Government stated that if the Government of the United States would refrain, or forbear, from

pressing for settlement the American claims upon the Government of Chile, that Government would, as soon as it had arranged with other powers for the settlement of their claims, at once take up and adjust the claims of American citizens. It is a matter of record, as set forth above, that the Government of the United States, placing reliance upon this promise of the Government of Chile, did refrain or forbear from pressing upon the attention of the Government of Chile the claims of its nationals. And the Government of Chile was more than once informed that the reason for the patience of the United States in the matter of the settlement of its claims was that the Government of the United States was placing full and complete reliance in the promise which the Government of Chile had thus formally and repeatedly given. These repeated promises and this patient forbearing continued for a long series of years, during which the Government of the United States showed every kindly consideration for the feelings of the Government of Chile and for the unfortunate conditions in which that Government often found itself placed.

Such forbearance at the instance of the debtor has under the common law a peculiar legal value. For hundreds of years it has been good law in England and, since the formation of the American Colonies, in America that forbearance to sue is a good and ample consideration for a promise. This is settled by law in both England and America, as announced by text writers and enforced by the courts.

The rule of law as laid down in Williams' Notes to Saunders' Reports (209a) is as follows:

"(1) But if the promise be, in consideration of forbearance by such assignee of the debt, to sue the executor or administrator, that is a sufficient consideration. 1 Rol. Abr. 20, pl. 11. *Pitt v. Bridgewater*, S. C. Hard. 74, 1 Lev. 188. *Russel v. Haddock*. For it is sufficient in the case of any other debtor, whom the assignee of the debt forbears, at his request, to sue. Hard. 71. *Reynolds v. Prosser*. 1 Vent. 153. *Oble v. Dittlesfield*. 1 Rol. Abr. 20, pl. 60; though *Potter v. Turner*, Winch 7, and *Palm*. 185, S. C., was decided to the contrary: but this is contradicted by all other authorities (a)." (p. 220).

"In all cases of forbearance to sue, such forbearance must be either absolute; Cro. Jac. 47. *Fish v. Richardson*; (or for a reasonable time; 2 H. & N. 517. *Oldershaw v. King*.) 1 Rol. Abr. 24, pl. 33. *Johnson v. Whitcott* (see 7 B. & C. 423. *Payne v. Wilson*); forbearance for a little; 1 Rol. Abr. 23, pl. 25; or for some time; *ibid.* pl. 26; is not sufficient. It must be shown in the declaration, that there was some person liable to be sued; 4 East. 455. *Jones v. Ashburnham*; but the omission is cured by verdict. 1 N. R. 172.

*Marshall v. Birkenshaw*. And it is not necessary to state the precise nature of the debt forborne. Cro. Jac. 396. *Thorne v. Fuller*. Cro. Jac. 548. *Austen v. Bewley*. So desisting from a complaint before a justice of the peace, Cro. Eliz. 881. *Rippon v. Norton*, is a sufficient consideration; or forbearing to proceed upon a *cap. utlagatum*. Cro. Eliz. 909. *Jennings v. Harley*. Yelv. 19 S. C. See Selwyn's N. P. 49. *Tit. Assumpsit*, where all the cases are collected. See further, as to forbearance to executors, *post.* 2 Saund., notes to *Barber v. Fox*." (pp. 225-226).

Chitty, in his Treatise on the Law of Contracts, states the principle in the following words:

"And generally, any damage, or any suspension or forbearance of a right, or any possibility of a loss occasioned to the plaintiff by the promise of another is a sufficient consideration for such promise;  
\* \* \*

"As to particular kinds of forbearance, it is well settled that an agreement to *forbear* either absolutely, or for a certain time, or for a reasonable time, to institute or prosecute *legal* or *equitable* proceedings to enforce a legal or equitable demand, is a sufficient consideration for the promise of the debtor, or of a third person, to pay the debt, or to do any other act. By such forbearance the creditor is delayed, and the debtor is, or may be, benefited; so that there concur both the ordinary grounds upon which a sufficient consideration may be rested." (Ch. 2, p. 24).

The principle was, as stated above, very early announced and acted upon by the courts. In 21st James I, in *Mapes Executor of Holdick v. Sir Isaac Sidney*, the Common Bench, in an action of Assumpsit, "For that the Defendant in consideration the Plaintiff would forbear to sue one J. S. upon an obligation of 80l., promised to pay unto him the said debt," it was held by Lords Hobart, Winch, and Hutton (Jones being absent in Chancery):

"That the Plaintiff should recover; for they all conceived that a consideration to forbear to sue one such, for such a Debt is a good consideration; and it shall be intended a total and absolute forbearance, as Hutton and Winch held: And that if the Defendant paid it before upon this promise, and after the Plaintiff sued for the Debt, the Plaintiff is chargeable in an Action upon the Case; for it is an implied promise in the Plaintiff, that he should forbear his Suit totally: But yet when the Plaintiff hath forborne a convenient time (when there is no time mentioned) if the Defendant do not pay the Debt according to his promise, the Plaintiff may well sue him upon his promise, and he needs not tarry all his life. And here, when he shows that he forbore per magnum tempus, viz. such a day and year, that well agrees with the writ; and when the date of the writ doth not appear, it shall be intended that he did forbear until the day of the writ: And so the action is well brought. Hobart Chief Justice agreed with them, that the action was well brought, and the Declaration good, because he shows he did forbear it for a convenient time. And he held, that he was not bound by this agreement to forbear totally. And denied that upon this agreement he is chargeable

in an Assumpsit, if he (after this Debt recovered from the Defendant) should sue for the same Debt; for it is not a promise to restrain him totally; and without express words he is not chargeable by promise; Wherefore it was adjudged for the Plaintiff." (Croke's Reports, Part II, p. 683, 684; *Mapes Executor of Holdick vs. Sir Isaac Sidney*).

This case has been followed by a long line of decisions, affirming, amplifying, and making more certain the rule laid down, though leaving the fundamental doctrine untouched, many of which cases have been collected by Chitty in his work above cited.

As has already been stated, the courts of the United States have repeatedly announced and followed the same rule. As early as 1809 the Supreme Court of New York, in an action of assumpsit in the case of *Elting v. Vanderlyn* (4 Johnson, 237), announced this principle:

"The declaration stated, that one *Zachariah Hoffman*, now deceased, was, in his life-time, justly indebted to the intestate, in his life-time, in divers sums of money, &c.; that the intestate, in his life-time, was about to sue the heirs of the said *Hoffman*, for the recovery of the sums so due him; 'that thereupon the said *Jacobus Vanderlyn*, in consideration that the said *R. I. Elting*, (the intestate), in his life-time, at the special instance and request of the defendant, would forbear to prosecute the heirs of the said *Z. Hoffman*, of which the defendant, in right of his wife, was one, he, the defendant, undertook and faithfully promised the intestate, in his life-time, and since, to wit, on the 1st May, 1807, at, &c., undertook and promised the plaintiff's administrators to pay them the several sums of money so due and owing from the said *Hoffman*, in his life-time, to the said *Elting*, in his life-time, &c.; that the said *Elting*, in his life-time, confiding in the said promise, &c., did forbear to prosecute, &c., for two years longer, and hitherto hath forborne to prosecute, &c., and that the plaintiffs, as administrators, since the death of *Elting*, have also forborne to prosecute,' &c. The defendant pleaded *non-assumpsit*, and *non assumpsit infra sex annos*.

"The cause was tried at the *Ulster* circuit in *September* last, when the jury found a verdict for the plaintiffs.

"A motion was made, at the last term, in arrest of judgment, on the following grounds:

\* \* \* \* \*

"3. Because a promise to pay, in consideration of an indefinite forbearance, is void."

"VAN NESS, J., delivered the opinion of the court. \* \* \*

"3. The consideration of forbearance generally is sufficient, without setting forth a specific time. There was, in fact, a total forbearance for a long time, which brings the case within that of *Mapes v. Sidney* (*Cro. Jac.* 683). The court are of opinion, that the motion must be denied."

The principle here laid down continues in force in New York, as is shown by the opinion of Brown, J. in the case of the *Trader's*



*National Bank v. Parker* (1892), 130 N. Y., 415, 420, where the following language is used:

"On the contrary, the whole current of authority is to the effect that an agreement to withhold suit is a good consideration to support a promise to pay a debt, although no fixed and definite time is expressly agreed upon. (Rolles Abgt. 27, pl. 45; Brandt on Suretyship and Guaranty, §8; 1 Parsons on Contracts (6th ed.) p. 444; *Walker v. Sherman*, 11 Netc. 170-172; *Mecorney v. Stanley*, 8 Cush. 85-88; *Hakes v. Hotchkiss*, 23 Vt. 231; *Calkins v. Chandler*, 36 Kich. 320; *Lonsdale v. Brown*, 4 Wash. 148; *Downing v. Funk*, 5 Rawle, 69; *Sidwell v. Evans*, 1 Penn., 383; *King v. Upton*, 4 Me. 387; *Elting v. Vanderlyn*, 4 Johns. 237; *Watson v. Randall*, 20 Wdnd, 201; *Mut. Life Ins. Co. v. Smith*, 23 Hun. 535).

"The legal effect of such an agreement is to bind the creditor to withhold suit for a reasonable time. What would be a reasonable time, if not always a question of fact, would at least be a mixed question of law and fact, depending for its solution upon the circumstances of each case.

"The precise question at issue here was decided in this state in *Elting v. Vanderlyn* (supra). There the judgment was attacked on the ground that the promise to pay was in consideration of an indefinite forbearance, and was void. The court said: 'The consideration of forbearance generally is sufficient without setting forth a specific time. There was in fact a total forbearance for a long time, which brings the case within that of *Mapes v. Sidney* (Cro. Jac. 283).' This case has never been questioned or overruled.

"In the case before us, there was total forbearance, as no suit was ever brought against Hodgson or James on the note.

"The general rule is that the waiver of any legal right, at the request of another party, is a sufficient consideration to uphold a promise.

"There was clearly such waiver shown in this case, and the referee having found an express agreement to that effect, judgment in the plaintiff's favor necessarily followed."

Other states of the American Union have announced a like rule. In the case of *Mascole v. Montesanto* (1891) 61 Conn., 50, 53, Andrews, C. J., delivering the opinion of the court, stated the principles as follows:

"The first, fourth and fifth reasons are, in substance, that the note was without a valid consideration. We think, however, that a sufficient consideration appears. The note is expressed to be for value received. These words indicate a sufficient consideration in the absence of anything to the contrary. In this note not only is there nothing to the contrary, but a good consideration expressly appears. The withdrawal of the suit against his son without further costs was a sufficient consideration for the promise contained in the note. 'Any damage, or any suspension of a right, or any liability to a loss occasioned to one by the promise of another, is a sufficient consideration for such promise and will make it binding, though no actual benefit accrues to the promisor.' 1 Rev. Swift's Digest, top page 195. 'A promise in consideration of ceasing suit is good, for that is a

benefit to the defendant as well as a damage to the plaintiff, though the action is not discharged.' Id., 196. The authority cited by Judge Swift on this point is *Bidwell v. Catton*, Hobart's Reports, 216. That case was as follows. Bidwell, an attorney, brought an action on the case against Catton, executor of Reve, and counted that whereas he had in Michaelmas term, 14 Jac., Prosecuted an attachment of privilege against Reve, the testator, recognizable in Hiliary term, the testator, knowing of it, in consideration that at his request the plaintiff would forbear to prosecute said suit any farther against the testator, did promise to pay him fifty pounds; and then averred, etc. After verdict it was excepted in arrest of judgment:—first, that it was not alleged that the plaintiff had any just cause of action; and secondly, that the action still remains. But the court nevertheless gave judgment. For, first, suits are not presumed causeless; and the promise argues cause in that he desired to stop off the suit. Secondly, though this did not require the discharge of the action, yet it did require a loss of the writ and a delay of the suit, which was both a benefit to the one and a loss to the other. *Sage v. Wilcox*, 6 Conn., 81; *Stoddard v. Mix*, 14 Conn. 12; *Pratt v. Humphrey*, 22 Conn., 317. Nor is it material that the party who makes the promise in consideration of such forbearance should have a direct interest in the suit to be forborne or be directly benefited by the delay. *Smith v. Algar*, 1 Barn. & Adol., 603; 1 Chitty on Contracts, (11th Ed.,) 39, 41; 1 Parsons on Cont. 5th ed. 443."

The courts of Massachusetts have expressed and followed a like rule. In *Howe v. Taggart* (1882), 133 Mass., 284, 287, Field, J., speaking for the Court, made the following statement of the principle:

"It seems to have been assumed in this Commonwealth that an agreement to forbear bringing suit for a debt due, even although for an indefinite time, and even although it cannot be construed to be an agreement for perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise. *Prouty v. Wilson*, 123 Mass. 297. *Robinson v. Gould*, 11 Cush. 55. *Boyd v. Frieze*, 5 Gray, 553. *Ellis v. Clark*, 110 Mass. 389. *Pratt v. Hedden*, 121 Mass. 116. *Mecorney v. Stanley* 8 Cush. 85. *Manter v. Churchill*, 127 Mass. 31. See also *Coles v. Pack*, L. R. 5 C. P. 65; *Oldershaw v. King*, 2 H. & N. 517."

And finally it should be noted that even the youngest of the American States have invoked the same rule. In *Marshall v. Old*, 14 Colo. App. 32, 35–36, the following statement is made by the court:

"The complaint distinctly says that in consideration of the defendants' agreement the plaintiff forebore foreclosure for two years, and that from time to time he received from the defendants rents which had been collected by them from tenants of the premises. The forbearance was in consideration, not of the plaintiff's, but of the defendants' agreement. It was therefore upon that agreement that the minds of the parties united. In conformity with that agreement, the plaintiff forbore, and the defendants paid him the rent.

By the acts of the parties, it became a valid and enforceable contract. The defendants made the offer and the plaintiff accepted it. It was not necessary for the plaintiff to agree, in words, to postpone foreclosure. His assent to the proposition was signified by his compliance with the terms of the offer. A request followed by performance constitutes a contract. *Yancey v. Brown*, 3 Sneed, 90; *Strong v. Sheffield* 144 N. Y. 392; *Morton v. Burn* 7 E. & A. 19; 2 American Leading Cases (5th ed.), 96, *et seq.*

"And it is not necessary that there should be a stipulation to forbear for a specified time. An agreement to forbear for an indefinite time, if followed by actual forbearance for a reasonable time, is a good consideration for a promise. *Elting v. Vanderlyn*, 4 Johns. 237; *Thomas v. Croft*, 2 Rich. Law. 113; *Howe v. Taggart*, 133 Mass. 284; *King v. Upton*, 4 Me. 387; *Moore v. McKenney*, 83 Me. 80."

It seems sufficiently established by the above citations and quotations, which might be indefinitely multiplied, that under the principles of municipal law governing the transactions between private individuals of both Governments the promises, as above set forth, would, had they passed between private individuals, have constituted a legal and binding contract.

But, it is unnecessary to depend in the present case upon the analogy of the private law of either country. There have been repeated decisions of international commissions that a formal promise of this kind made by the proper representative of one country to the proper representative of another constitutes a legal and binding obligation upon the part of the Government whose officer makes the undertaking. It is not without significance in this regard that before the first United States and Chilean Claims Commission, of 1894, the Government of Chile presented to the Commission a claim founded upon a similar promise given by the diplomatic representative of the United States, and the Commission, after examination, found the promise to be valid and binding and gave a substantial award thereon. The case to which reference is here made is the case of *Ricardo L. Trumbull v. The United States*, which, as given in a unanimous decision of the Commission, reads as follows:

"In the opinion of the Commission the sections of the Revised Statutes of the United States (sections 3732 and 5278) upon which the respondent Government bases its demurrer are not applicable to the relations that subsisted between the claimant and the Honorable Minister at Santiago.

"The first provision seems to have been enacted for the regulation of the officers of the United States in the performance of their duties, and the second as a rule for the settlement of expenses between the States and the National Government.

"By no rule or legal prescription was the memorialist bound to know the sections of the Revised Statutes or to act in conformity with them.

"On the contrary, he knew that the Minister of the United States was instructed by his Government to proceed in a matter of extradition, and that the proceedings before the Chilean Court could only be conducted through an intermediary counsel. Mr. Trumbull was requested by the Minister to act as counsel.

"He was justified in presuming that the Minister of the United States acted in accordance with his instructions from the Secretary of State, and also pursuant to the rule that the expenses of extradition, including fees of counsel are paid by the demanding State.

"He was right also in assuming that the Minister was authorized to say to him, 'to have no concern in the matter, as he (Trumbull) would be paid by the United States Government for his services.'

"Whether the Honorable Minister of the United States at Santiago exceeded his authority in entering into the contract with Mr. Trumbull is a question that, for the purposes of the demurrer, is of no importance.

"As a representative of the United States he made, as is confessed by the demurrer, a promise in the name of his Government, which, according to the rules of the responsibility of Governments for acts performed by their agents in foreign countries, cannot be repudiated. (*Calvo, Dictionnaire de Droit International et Prive, Vol. 11, p. 170. Also Calvo, Droit International Vol. 1, §417.*)

"As to the argument that the claimant has a complete remedy in the courts of the United States, it is to be said that the competency of this Commission to take jurisdiction of this claim cannot be denied under the authority to settle and adjust amicably all claims of citizens of Chile and of the United States against the Government of either country.

"The demurrer filed by the Agent of the respondent Government is therefore overruled.

"The Commissioner of Chile concurs with his honorable colleagues in the foregoing decisions in so far as it establishes the responsibility of the Government for the acts of its agents, but does not accept, without certain limitations, the last point in said decision.

"(Signed.) ALFRED DE CLAPAREDE, *President.*

"(Signed.) DOMINGO GANA, *Commissioner on the part of Chile.*

"(Signed.) JOHN GOODE, *Commissioner on the part of the United States.'*"

(Moore's Int. Arb. Dig. Vol. 4, p. 3570.)

The decision here given was promptly accepted by the Government of the United States as legal and binding and the award therein made was satisfied.

This decision has since this time constituted a precedent for the decision of at least one other case in an international arbitration. In the case of *John D. Metzger & Co. v. Haiti*, arbitrated under a Protocol of Arbitration signed October 18, 1899, Judge William R. Day, the arbitrator in the case, in the course of his opinion, discussed this question in the following language:

"It appears from the diplomatic correspondence that the attention of the Haitian minister at Washington having been called to the claim of Metzger & Co., as to the inadequate water supply for the mill, the minister at once gave assurances that Metzger & Co.'s grievances in that behalf should be adjusted on an equitable basis. On the 3rd of June, 1898, Mr. Leger, the Minister of Haiti at Washington, in answer to a note from the Secretary of State of the United States at Port au Prince reported Metzger & Co.'s Mill still deprived of water, said in his note:

"In reply, I must not fail to confirm what I had the honor to state to you in an interview of the 2nd instant. According to the agreement reached with the solicitor of the Department, I informed my Government of Mr. Metzger's grievances, and the Secretary of State of foreign relations recently wrote to me that the matter had been settled within twenty-four hours.'

"Afterwards the attention of the minister of Haiti at Washington being called to this agreement, he assured the State Department that it had been attended to for some time. An investigation shows that the honorable minister was laboring under a misapprehension in this regard. A visit was made to the Metzger establishment by the Mayor of the commune, who reported that water was furnished to the satisfaction of Mr. Metzger. Doubtless this report misled the minister. An investigation made by Minister Powell shows that there was very little water and the supply at that time was entirely inadequate. Until January, 1899, no successful attempt was made to carry out the contract. I am of the opinion that this arrangement agreeing to settle Metzger & Co.'s grievances, promptly accepted by the Secretary of State for foreign relations of Haiti, followed by the assurance of the secretary, conveyed by the minister to the State Department at Washington, that the matter had been settled within twenty-four hours, constituted a diplomatic agreement between the two countries which, upon settled principles of international law, should have been carried into effect. It is claimed, on the part of the Government of Haiti, that this correspondence amounted only to an agreement on the part of Haiti to use its good offices with the commune of Port au Prince. I am of opinion that it amounted to much more than that. When the grievance was called to the attention of the minister at Washington, and through him reported to the secretary, no claim was made that the commune alone was responsible, and no attempt was made to limit the authority or responsibility of the Government. On the contrary, the minister and secretary promptly assumed responsibility for the grievance and assured the Government at Washington that it had been rectified. It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements. It is now strenuously urged that the Government of Haiti had no authority over the commune of Port au Prince, and must, in its relations with the commune, have limited its interference to friendly advice and suggestions. I do not understand that the limitations upon official authority, undisclosed at the time to the other government, prevent the enforcement of diplomatic agreements. The question came before the Chilean claims commission created by the convention of August 7, 1892, between the United States and Chile, in which a claim was made upon a contract entered into by the United States

Minister in Chile, in making which the Government of the United States claimed the minister had no authority and denied responsibility, claiming further that the agreement was in violation of the statutes of the United States, and that the plaintiff had a remedy in the United States courts. The commission decided unanimously that it was immaterial whether the minister had exceeded his authority or not, as he had made the promise as the representative of the United States in the name of his Government, which, according to the rules of responsibility of governments for acts performed by their agents in foreign countries, can not be repudiated. In the present case there is no claim that the minister was unauthorized to make the diplomatic representations stated. On the contrary, he was only carrying into effect the instructions of his Government. The learned commission referred, in support of their decisions, to Calvo Dictionaire de Droit International, Volume II, page 170, and Calvo Dictionaire International, Volume I, section 417; Moore's Digest International Arbitration, volume 4, pages 3569-3571. Nor is there any more avail in the argument that the remedy of Metzger & Co. is to be sought in the courts of Haiti against the commune. Even had Metzger & Co. such a right, this would not affect the right to arbitrate the claim as has been done in this case. By the terms of the protocol the arbitrator is competent to take jurisdiction of the claim so far as the liability of the Government of Haiti is concerned (4 Moore International Arbitration, p. 3571). This view of the case renders it unnecessary to determine whether, as is claimed in argument, the communal authorities are merely the agents of Haiti or whether, as contended by the minister of Haiti, the Government of Haiti had entirely made over the water works to Port au Prince, which alone received the revenues and managed its affairs. A diplomatic arrangement fairly and honorably entered into should in my judgment, be carried into effect. I have already stated what, in my opinion, were the rights of Metzger & Co. under the arrangement made with the commune to supply them with water. This is the arrangement which should have been carried into effect. It should have been carried out by the Government of Haiti upon the responsibility assumed by it. Because of the failure to give them an adequate supply of water Metzger & Co.'s mill was compelled to remain idle, partially for a time and afterwards to entirely suspend operations. Much of the claim for alleged damages on behalf of complainant can not be allowed. The items showing remote and speculative damages do not directly result from the breach of the agreement. The claimants are entitled to compensation for loss of the use of the mill in whole or in part during the time in which they were unable to operate it by reason of the failure to furnish water and its impaired usefulness when an adequate supply was furnished to them. I am of opinion that damages fairly recoverable in a case of this kind will be compensated by the payment to Metzger & Co. by the Government of Haiti of the sum of \$15,000." (Foreign Relations, 1901, p. 270.)

It would appear that not without reason did Judge Day, in the Metzger case, press so vigorously upon the matter of the sanctity of what he termed a "diplomatic agreement." Some

of the earliest writers upon international law discussed with some fullness the question of the good faith which must obtain between nations. Vattel, in his "Law of Nations," discussed this general subject in the following language:

"§163. It is a settled point in natural law, that he who has made a promise to any one, has conferred upon him a real right to require the thing promised,—and, consequently, that the breach of a perfect promise is a violation of another person's right, and as evidently an act of injustice as it would be to rob a man of his property. The tranquility, the happiness, the security, of the human race, wholly depend on justice,—on the obligation of paying a regard to the rights of others. The respect which others pay to our rights of domain and property constitutes the security of our actual possessions; the faith of promises is our security for things that cannot be delivered or executed upon the spot. There would no longer be any security, no longer any commerce between mankind, if they did not think themselves obliged to keep faith with each other, and to perform their promises. This obligation is, then, as necessary as it is natural and indubitable, between nations that live together in a state of nature, and acknowledge no superior upon earth, to maintain order and peace in their society. Nations, therefore, and their conductors, ought inviolably to observe their promises and their treaties. This great truth, though too often neglected in practice, is generally acknowledged by all nations: the reproach of perfidy is esteemed by sovereigns a most atrocious affront; yet he who does not observe a treaty, is certainly perfidious, since he violates his faith." (Vattel's Law of Nations, p. 196.)

"§164. As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is therefore a violation of the perfect right of the party with whom we have contracted; and this is an act of injustice against him." (Vattel's Law of Nations, p. 196.)

"§207. \* \* But public persons, by virtue of their office or of the commission given to them, have also themselves the power of making conventions on public affairs, exercising on those occasions the right authority of the sovereign by whom they are commissioned. There are two modes in which they acquire that power;—it is given to them in express terms by the sovereign: or it is naturally derived from their commission itself,—the nature of the affairs with which these persons are entrusted, requiring that they should have a power to make such conventions, especially in cases where they cannot await the orders of their sovereign." (Vattel's Law of Nations, p. 217.) \* \* \* \* \*

"§215. When a lawful power contracts in the name of the state, it lays an obligation on the nation itself, and consequently on all the future rulers of the society. When, therefore, a prince has the power to form a contract in the name of the state, he lays an obligation on all his successors; and these are not less bound than himself to fulfill his engagements." (Vattel's Law of Nations, p. 225.)

It is unnecessary to say that the rules and principles thus laid down by Vattel have usually been considered by sovereign states as expressing the rules of conduct which, as to the matters involved, should be always observed between them. If nations are to live in harmony and goodfellowship; if equity and justice are to govern their relations; if mutual respect is to obtain between and among them; if the society of nations is to be more than a hope; and if peace and good will are to become the sovereign rulers of the world—then it must be, as laid down by Vattel, that each and every nation must be guided in all its dealings by such principles, a universal adherence to which by all the leading nations of the world is the fruition of the highest aspirations which civilization has developed; and, further, all nations must, as an initial preliminary and indispensable corollary to this attitude, stand for a scrupulous adherence to and full performance of each and every international promise and obligation, and it must in justice be said that no nation has more frequently asserted that these high principles should control the intercourse of States than has the Government of Chile.



#### POINT IV.

THE CLAIMANTS IN THIS CASE HAVE SUFFERED, BY REASON OF THE VIOLATION BY THE GOVERNMENT OF CHILE OF THE CONTRACT OF DECEMBER 26, 1876, NEGOTIATED AND CONCLUDED BY AND BETWEEN THE GOVERNMENT OF BOLIVIA ON THE ONE SIDE AND JOHN WHEELWRIGHT ON THE OTHER, DAMAGES IN THE AMOUNTS HEREINAFTER SET FORTH, SAID DAMAGES ARISING FROM AND HAVING THEIR ORIGIN IN BOTH TORT AND CONTRACT, AND HAVE ALSO SUFFERED THE LOSS, PRINCIPAL AND INTEREST, OF THE DEBT RECOGNIZED AS DUE AND PAYABLE UNDER THE CONTRACT, UPON BOTH OF WHICH ACCOUNTS (TORT AND CONTRACT), AND FOR THE AMOUNTS HEREIN NAMED AND SET FORTH, THE CLAIMANTS PRAY JUDGMENT.

Before proceeding to the discussion of the quantum of damages, including the contract debt, which the Government of the United States contends is due and payable in this case, it is convenient to discuss the following propositions: (1) Interest should be paid upon claims presented on behalf of its citizens by one government to another government; (2) the quantum of the obligations, tort and contract, should be computed and determined by the actual and precise value and extent of the loss at the time such loss occurred, such loss to be expressed in coins of a known standard value, and such obligations so arising must be satisfied by the payment of an undebased or undepreciated currency, or if by payment of a debased or depreciated currency, then with an increase proportionate to the amount of debasement or depreciation; (3) the costs of litigation in suits resulting in a denial of justice should be regarded as proper elements in the claim for damages:

Considering these in their turn:

(1) *Interest should be paid upon claims presented on behalf of its citizens by one government to another government.*

It is the contention of the Government of the United States that since the losses in this case have been suffered by reason of the tortious acts of the Government of Chile, that Government, being a wrongdoer, must not only reimburse the claimants for the actual money loss sustained at the time the loss was incurred, but as a tortfeasor it must also pay upon such losses so suffered a fair

and equitable rate of interest from the date when the loss occurred to its settlement. The Government of the United States contends that every principle of justice and fair dealing in such cases requires the payment of a fair rate of interest to the concessionaries in the present case.

Feeling that this contention is one of such self-evident justice and equity that it requires no extended argument, the Government of the United States will content itself by the citation of a few authorities and by setting forth a few of the precedents (in many of which it has been concerned), showing that interest is in such instances due and payable, as these instances have been collected and set forth in a report of "The Committee on Appropriations [of the House of Representatives] to whom was referred the bill (H. R. 2189) 'to provide for the payment of the award made by the Senate of the United States in favor of the Choctaw Nation of Indians, on the 9th day of March, 1859.' "

This report reads in part as follows:

"THE OBLIGATION TO PAY INTEREST ON THE AMOUNT AWARDED THE  
CHOCTAW NATION.

"Your committee have given this question a most careful examination, and are obliged to admit and declare that the United States cannot, in equity and justice, nor without national dishonor, refuse to pay interest upon the money so long withheld from the Choctaw Nation. Some of the reasons which force us to this conclusion are as follows:

"6. By the principles of the public law, interest is always allowed as indemnity for the delay of payment of an ascertained and fixed demand. There is no conflict of authority upon this question among the writers on public law.

"This rule is laid down by Rutherford in these terms:

"'In estimating the damages which any one has sustained, when such things as he has a perfect right to are unjustly taken from him, or WITHHOLDEN, or intercepted, we are to consider not only the value of the thing itself, but the value likewise of the fruits or profits that might have arisen from it. He who is the owner of the thing is likewise the owner of the fruits or profits. So that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itself.' (Rutherford's Institutes, Book I, chap. 17, sec. 5.)

"In laying down the rule for the satisfaction of injuries in the case of reprisals, in making which the strictest caution is enjoined not to transcend the clearest rules of justice, Mr. Wheaton, in his work on the law of nations, says:

"'If a nation has taken possession of that which belongs to another, IF IT REFUSES TO PAY A DEBT, to repair an injury, or to give adequate satisfaction for it, the latter may seize something of the former and apply it to [his] its advantage, till it obtains payment of what is

due, together with INTEREST and damages.' (Wheaton on International Law, p. 341.)

"A great writer, Domat, thus states the law of reason and justice on this point:

"It is a natural consequence of the general engagement to do wrong to no one, that they who cause any damages, by failing in the performance of that engagement, are obliged to repair the damage which they have done. Of what nature soever the damage may be, and from what cause soever it may proceed, he who is answerable for it ought to repair it by an *amende* proportionable either to his fault or to his offense, or other cause on his part, and to the loss which has happened thereby.' (Domat, Part I, Book III, Tit. V, 1900, 1903.)

"Interest' is in reality, in justice, in reason, and in law, too, a part of the debt due. It includes, in Pothier's words, the loss which one has suffered, and the gain which he has failed to make. The Roman law defines it as 'quantum mea interfruit; id est, quantum mihi abest, quantumque lucrari potui.' The two elements of it were termed 'lucrum cessans et damnum emergens.' The payment of both is necessary to a complete indemnity.

"Interest, Domat says, is the reparation or satisfaction which he who owes a sum of money is bound to make to his creditor for the damage which he does him by not paying him the money he owes him.

"It is because of the universal recognition of the justice of paying, for the retention of moneys indisputably due and payable immediately, a rate of interest considered to be a fair equivalent for the loss of its use, that judgments for money everywhere bear interest. The creditor is deprived of this profit, and the debtor has it. What greater wrong could the law permit than that the debtor should be at liberty indefinitely to delay payment, and, during the delay, have the use of the creditor's moneys for nothing? They are none the less the creditor's moneys because the debtor wrongfully withholds them. *He holds them, in reality and essentially, in trust; and a trustee is always bound to pay interest upon moneys so held.*

"In closing these citations from the public law, the language of Chancellor Kent seems eminently appropriate. He says: 'In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims, and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of established writers on international law.'

"7th. The practice of the United States in discharging obligations resulting from treaty-stipulations has always been in accord with these well-established principles. It has exacted the payment of interest from other nations in all cases where the obligation to make payment resulted from treaty-stipulations, and it has acknowledged that obligation in all cases where a like liability was imposed upon it.

"The most important and leading cases which have occurred are those which arose between this country and Great Britain: the first under the treaty of 1794, and the other under the first article of the treaty of Ghent. In the latter case the United States, under the first article of the treaty, claimed compensation for slaves and other property taken away from the country by the British forces

at the close of the war in 1815. A difference arose between the two governments, which was submitted to the arbitrament of the Emperor of Russia, who decided that 'the United States of America are entitled to a just indemnification from Great Britain for all private property carried away by the British forces.' A joint commission was appointed for the purpose of hearing the claims of individuals under this decision. At an early stage of the proceedings the question arose as to whether *interest* was a part of that '*just indemnification*' which the decision of the Emperor of Russia contemplated. The British commissioner denied the obligation to pay interest. The American commissioner, Langdon Cheves, insisted upon its allowance, and, in the course of his argument upon this question, said:

"Indemnification means a re-imbursement of a loss sustained. If the property taken away on the 17th of February, 1815, were returned now uninjured it would not re-imburse the loss sustained by the taking away and consequent detention; it would not be an indemnification. The claimant would still be unindemnified for the loss of the use of his property for ten years, which, considered as money, is nearly equivalent to the original value of the principal thing."

"Again he says:

"If interest be an incident usually attendant on the delay of payment of debts, damages are equally an incident attendant on the withholding an article of property."

"In consequence of this disagreement, the commission was broken up, but the claims were subsequently compromised by the payment of \$1,204,960, instead of \$1,250,000, as claimed by Mr. Cheves; and of the sum paid by Great Britain, \$418,000 was expressly for interest.

"An earlier case, in which this principle of interest was involved, arose under the treaty of 1794 between the United States and Great Britain, in which there was a stipulation on the part of the British government in relation to certain losses and damages sustained by American merchants and other citizens, by reason of the illegal or irregular capture of their vessels, or other property, by British cruisers; and the seventh article provided in substance that 'full and complete compensation for the same will be made by the British government to the said claimants.'

"A joint commission was instituted under this treaty, which sat in London, and by which these claims were adjudicated. Mr. Pinckney and Mr. Gore were commissioners on the part of the United States, and Dr. Nicholl and Dr. Swabey on the part of Great Britain; and it is believed that in all instances this commission allowed interest as a part of the damage. In the case of *The Betsey*, one of the cases which came before the board, Dr. Nicholl stated the rule of compensation as follows:

"To re-imburse the claimants the original cost of their property, and all the expenses they have actually incurred, together with interest on the whole amount, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations, and accepted by all neutral nations, for losses, costs, and damages occasioned by illegal

captures.' (*Vide* Wheaton's *Life of Pinckney*, p. 198; also p. 265, note; and p. 371.)

"By a reference to the American State Papers, Foreign Relations, vol. 2, pages 119, 120, it will be seen by a report of the Secretary of State of the 16th February, 1798, laid before the House of Representatives, that interest was awarded and paid on such of these claims as had been submitted to the award of Sir William Scott and Sir John Nicholl, as it was in all cases by the board of commissioners. In consequence of some difference of opinion between the members of this commission, their proceedings were suspended until 1802, when a convention was concluded between the two governments, and the commission re-assembled, and then a question arose as to the allowance of interest on the claims during the suspension. This the American commissioner claimed, and though it was at first resisted by the British commissioners, yet it was finally yielded, and interest was allowed and paid. (See Mr. King's three letters to the Secretary of State, of 25th March, 1803, 23d April, 1803, and 30th April, 1803, American State Papers, Foreign Relations, vol. 2, pp. 387, 388.)

"Another case in which this principle was involved arose under the treaty of the 27th October, 1795, with Spain; by the twenty-first article of which, 'in order to terminate all differences on account of the losses sustained by citizens of the United States in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty during the late war between Spain and France, it is agreed that all such cases shall be referred to the final decision of commissioners, to be appointed in the following manner,' &c.; the commissioners were to be chosen, one by the United States, one by Spain, and the two were to choose a third, and the award of the commissioners, or any two of them, was to be final, and the Spanish government to pay the amount in specie. This commission awarded interest as part of the damages. (See American State Papers, vol. 2, Foreign Relations, p. 283.) So in the case of claims of American citizens against Brazil, settled by Mr. Tudor, United States minister, interest was claimed and allowed. (See Ex. Doc. No. 32, first session Twenty-fifth Congress, House of Representatives, p. 249.)

"Again, in the convention with Mexico of the 11th of April, 1839, by which provision was made by Mexico for the payment of claims of American citizens for injuries to persons and property by the Mexican authorities, a mixed commission was provided for, and this commission allowed interest in all cases. (House Ex. Doc. No. 291, Twenty-seventh Congress, second session.)

"So also under the treaty with Mexico of February 2, 1848, the board of commissioners for the adjustment of claims under that treaty allowed interest in all cases from the origin of the claim until the day when the commission expired.

"So, also, under the convention with Colombia, concluded February 10, 1864, the commission for the adjudication of claims under that treaty allowed interest in all cases as a part of the indemnity.

"So under the recent convention with Venezuela, the United States exacted interest upon the awards of the commission, from the date of the adjournment of the commission until the payment of the awards.

"The Mixed American and Mexican Commission, now in session here, allows interest in all cases from the origin of the claim, and the awards are payable with interest.

"Other cases might be shown, in which the United States, or their authorized diplomatic agents, have claimed interest in such cases, or where it has been paid in whole or in part. (See Mr. Russell's letters to the Count de Engstein, of October 5, 1818, American State Papers, vol. 4, p. 639, and Proceedings under the Convention with the Two Sicilies of October, 1832, Elliot's Diplomatic Code, p. 625.)

"It can hardly be necessary to pursue these precedents further. They sufficiently and clearly show the practice of this Government with foreign nations, or with claimants under treaties.

"8th. The practice of the United States in its dealings with the various Indian tribes or nations has been in harmony with these principles.

"In all cases where money belonging to Indian nations has been retained by the United States, it has been so invested as to produce *interest*, for the benefit of the nation to which it belongs; and such interest is *annually* paid to the nation who may be entitled to receive it.

Other writers upon this question have similarly expressed themselves in connection with the question of interest in matters of international indemnification. Mr. J. C. Bancroft Davis, in his "Notes upon the Foreign Treaties of the United States (See Treaties and Conventions between the United States and Other Powers, 1776-1887, pp. 1227-1229), in speaking of the well-established policy of the United States "to settle international disputes and individual claims by arbitration when possible" under claims conventions and treaties, says:

"Many of these treaties have been the subject of consideration and construction by the Attorneys General and the courts of the United States. The following are some of the main points of general construction which have been determined.

\* \* \* \* \*

"XII. Interest, according to the usage of nations, is a necessary part of a just national indemnification."

Phillimore in his work on International Law (Vol. IV, pp. 577, 583, 3d Edition) says:

"DCCXIV. As to *interest*, the jurists generally speak of three kinds, viz.:

"*i.* Interest naturally incident to the contract, either by express or implied stipulation, not founded on any wrongful act of a party (*intérêt*).

"*ii.* Interest due for the non-performance of the contract, which the English call *damages*, and the French *dommages-intérêts*.

"*iii.* Interest, [or 'demurrage'] due from delay in the due performance of the contract, founded therefore on the wrongful act of a party, which the French call *intérêts moratoires*"

\* \* \* \* \*

"DCCXX. The right to damages arises also from wrong done to property, that is, in this branch of Private International Law, to personal property, or *ex delicto*, perhaps more properly *ex maleficio*. Thus, if a ship in foreign or colonial waters be wrongfully seized or appropriated, the interest of that locality will be allowed by way of damages against the wrongdoer."

Story, in his work on the Conflict of Laws, p. 424 (8th Edition) makes upon this subject the following comments:

"Analogous to the rule respecting interest would seem to be the rule of damages in cases of contract, where damages are to be recovered for a breach thereof *ex mora*, or where the right to damages arises *ex delicto*, from some wrong or injury done to personal property. Thus if a ship would be illegally or tortiously converted in the East Indies by a party, the interest there will be allowed by way of damages in a suit against him. So the rate of damages on a dishonored bill of exchange will be according to the *lex loci contractus* of the particular party."

Other international tribunals than those cited above have also held that interest was due and payable upon international claims. Protocol 29 of the Geneva Arbitration regarding the proceedings of September 2, 1872 states:

"Count Sclopis, as President of the Tribunal, acknowledged the receipt, by the arbitrators, of the note presented by the Agent of Her Britannic Majesty on the question of interest, and of the reply to the same, presented by the Agent of the United States.

"The Tribunal then proceeded to consider that question, and a majority of forty-one decided that interest should be admitted as an element in the calculation for the award of a sum in gross."

(Papers Relating to the Treaty of Washington, Vol. IV, p. 44)

The principle here announced was afterwards followed in distributing among the individual claimants the lump sum awarded by the Geneva Convention. (Moore's Int. Arb., Vol. 4, p. 4241.)

See also upon this same point United States and Venezuelan Claims Commission, 1889-1890, Opinions delivered by the Commissioners, p. 194, regarding the allowance of 6 per cent interest in the Idler claim.

The Commission appointed by the Powers upon the question of indemnities for injuries suffered as the result of the Boxer uprising in China in 1900 provided in Resolution 5 (II) as follows:

"(II) The amount of the indemnities can not in any case be augmented by interest at more than 5 per cent on personal claims and 7 per cent on commercial claims. Interest can only be allowed if it represents a loss actually incurred, and which shall have been proved in accordance with Article VII, given below. *It will be*

*calculated from the day on which the wrong entitling the compensation took place."*

(For. Rel. 1901, Appen. p. 107 Commissioner Rockhill's Report, Nov. 30, 1901)

Under the convention of 1858 between the United States and China for the adjustment of claims of citizens of the United States against China, the Commissioners stated in the final record of their proceedings, that—

"The commissioners agreed, after consultation, that it was desirable to place on record the fact that interest has been allowed to the claimants at the liberal rate of 12 per cent. per annum, in consideration of the circumstance that there will be some delay in making payment of the amounts awarded; and it is further to be distinctly understood that the allowance of interest made in the awards, severally, is absolutely final, and no more interest is to be allowed in any manner or upon any consideration whatever."

(The Caldera Cases, 15 Ct. Cl., pp. 546-580)

The British courts have followed the same rule wherever they have been called upon to pass upon international obligations.

For example: in the case of *Elkins v. East India Company* [1717], (1 P. Wms. pp. 395, 396) the court in making a *per curiam* decision said:

"If a man has my money by way of loan, he ought to answer interest; but if he retains my money from me wrongfully he ought *a fortiori* to answer interest." (See *Pearse v. Green*, 1 J. & W. 135. *Treves v. Townsend*, 1 Cox, 50). And it is still stronger, where one by wrong takes from me either my money or my goods which I am trading with, in order to turn them into money."

It is submitted that in the face of these numerous expressions of text-writers and of the uniform practice of international tribunals as set forth above, as well as under the rulings of the national courts of the two countries it cannot be doubted that the law and the equity of this situation requires the payment of interest upon the various accounts hereinafter set forth:

(2) *The quantum of the obligations, tort and contract, should be computed and determined by the actual and precise value and extent of the loss at the time such loss occurred, such loss to be expressed in coins of a known standard value, and such obligations so arising must be satisfied by the payment of an undebased or undepreciated currency, or if by payment of a debased or depreciated currency, then with an increase proportionate to the amount of debasement or depreciation.*

*Concerning the tort claim.*—The Government of the United States contends and insists that where the situation involves a dealing with constantly depreciating currency, the true way in which to



gauge the amount for which the sovereign tortfeasor is liable in any given case is to compute the actual and precise value of the claim, at the time the loss occurred, in currency of a permanent and standard value, such actual loss to be regarded as the basis of the obligation imposed upon the sovereign by his tort. For example, if a sovereign should tortiously confiscate property (belonging to a neutral alien) worth a thousand national units, of a face value of one hundred cents each, but of a real value of but fifty cents gold each, the real value of the obligation which such a tortious act would impose upon the sovereign would be not one thousand dollars gold, but five hundred dollars gold of standard coinage; and if the sovereign tortfeasor should omit or neglect to pay and satisfy such obligation within a reasonable time, this five hundred dollars gold standard value should draw interest at an appropriate rate.

Moreover, to carry this illustration further, if after twenty years the sovereign tortfeasor finally undertook to discharge this original obligation of five hundred dollars gold of standard coinage with an appropriate interest, say 6 per cent, he could not meet such obligation by paying one thousand dollar bills or coins when such dollar bills or coins while on their face worth one hundred cents were, on account of depreciation, worth but twenty-five cents of standard coinage. In such a case the obligation of the sovereign tortfeasor, if met in his depreciated currency, must be met by the payment, not of one thousand of his dollar bills or coins, but by four thousand of such bills or coins actually worth but twenty-five cents each in coins of standard value, with such additional sum as might be necessary to meet the interest.

It is believed to be unnecessary to enter into any extended argument upon either the equity and justice or of the law covered by the above propositions. Indeed, it seems too clear for argument that, under the hypothetical circumstances above set forth, the amount of which the alien resident has been deprived by the sovereign tortfeasor is the actual value of the money taken by the tortfeasor, estimated in a coin of standard value at the time the money was taken. All commercial transactions are based upon this fundamental principle of right and justice. A merchant of a country having a depreciated currency purchasing goods from a country having a standard currency pays for such goods, not with his own depreciated currency, but with the standard currency of the country of the vendor; or if payment is made with a

depreciated currency, then with an increase of such currency proportionate to the percentage of depreciation. Commercial transactions between individuals of different countries would be absolutely impossible upon any other theory.

As to the second proposition, regarding the payment in a depreciated or debased currency of a debt the actual value of which has been estimated as above set forth, it should be said that the courts of England have time and again recognized the equity, under such circumstances as exist in this case, of paying debts in a currency undebased and undepreciated, or if in a currency debased or depreciated then with a proportionate increase. Upon this point, attention is called to the expression of text-writers and courts, who are clear in the announcement of the doctrine above set forth.

Phillimore, in his work on International Law, Vol. 4, p. 583 et seq. (3rd ed.), makes upon this subject the following comments:

"DCCXXI. A question often mooted, and not very satisfactorily or consistently settled either by the English or the United States tribunals, arises with respect to the value of the *currency* by which the amount of a debt, which has been contracted in one country and is sued for in another, is to be ascertained.

"The following predicaments appear to embrace the cases which arise under this head:

"(1) Where the par value [or rate of exchange] between the currencies of the two countries is nominal or established by law.

"(2) Where there is no established par.

"(3) Where the debt has been contracted to be paid in a particular specified coin.

"(4) Where the currency, between the time when the debt was contracted or became due, and the time of actual payment, has suffered a depreciation in value."

\* \* \* \* \*

"DCCXXIV. The fourth predicament relates to the *depreciation of money* between the time when the debt was contracted or due, and the time when it is actually paid; *Nobilissima quaestio*, as it has been not improperly designated.

"This question may present itself in two very different forms:

"*i.* As a case of international Law arising *ex delicto* of a wrongdoer, whether a state or an individual.

"*ii.* As a case of international Law arising out of a contract between individuals, the subjects of or domiciled in different states, or from the dispositions of a unilateral act, such as a will or deed executed by an individual who is a subject of or domiciled in one state, which affects the rights of an individual who is a member of or domiciled in another state.

"DCCXXV. As to the case of a wrongdoer, it has no analogy, as Sir William Grant observed, to the case of creditor or debtor; *the obligation on the wrongdoer, be he a government or an individual,*

*is to undo the wrong act and put the party into the same situation as if he had never done it."*

See also the following paragraph DCCXXVI.

In the opinion by Sir William Grant (*Pilkington v. Commissioners for Claims on France*, II Knapp, 12), to which reference is made by Phillimore, the learned Master of the Rolls expressed himself as follows:

"The Treaty of 1814 provides, generally, a compensation for all losses that British subjects may have sustained by the confiscation or sequestration of their debts, without distinguishing whether those debts were originally due from the French Government or from private subjects. It is impossible to assign a reason why, if the French Government seized the debts of one British subject and the goods of another British subject, it should make a compensation for the goods, but make no compensation on account of the debt.  
\* \* \*

"It is hardly possible, perhaps, that sequestration for fifteen months should not have been productive of some loss to a creditor; but a question has been discussed at the bar, how much another species of loss, which had accrued from a depreciation of assignats from the passing of the decree to the repeal of it, is to be charged to the French Government. That question is not directly brought before us by the adjudication of the Commissioners; but as it has been discussed at the bar, it may be better, to prevent future controversy, to say a word upon it. \* \* \*

"Great part of the argument at the bar would undoubtedly go to show that the Commissioners have acted wrong in throwing that loss upon the French Government in any case; for they resemble it to the case of depreciation of currency happening between the time that a debt is contracted and the time that it is paid; and they have quoted authorities for the purpose of showing that in such a case the loss must be borne by the creditor, and not by the debtor. That point it is unnecessary for the present purpose to consider, though Vinnius, whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davis's Reports (case of Mixt Monies, Sir J. Davis, p. 26, 6th Resolution of Judges); he takes the distinction, that if between the time of contracting the debt and the time of its payment the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more as would make it equal to the sum he borrowed; but he says, if the nominal amount of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for 30s., the debtor may liberate himself from a debt of £1 10s. by paying a guinea, although he had borrowed the guinea when it was but worth 21s. I have said it is unnecessary to consider whether the conclusion drawn by Vinnius, or the decision in Davis's Reports, be the correct one; for we think this has no analogy

to the case of creditor and debtor. There is a wrong act done by the French Government; then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. It is assumed to be a wrong act, not only in the treaty, but in the repealing decree; they justify it only with reference to that which, as to this country, has a false foundation; namely, on the ground of what other governments had done towards them; they having confiscated the property of French subjects, therefore, they say, we thought ourselves justified at the time in retaliating upon the subjects of this country. That being destitute of foundation as to this country; the Republic themselves, in effect, confess that no such decree ought to have been made, as it affected the subjects of this country; therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrong doer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at the value of 50d. he must not make compensation by returning an assignat which is worth only 20d.; he must make up the difference between the value of the assignats at different periods. And that is the case stated by Sir John Davis (Sir J. Davis, p. 27), where *restitutio in integrum* is stated. He says, two cases were put by the Judges who were called to the assistance of the Privy Council, although they were not positively and formally resolved: he says, it is said if a man upon marriage receive £1000 as a portion with his wife, paid in silver money, and the marriage is dissolved *causa præcontractus*, so that the portion is to be restored in equal good silver money, though the State shall have depreciated the money in the mean time. So, if a man recover £100 damages, and he levies that in good silver money, and that judgment is afterwards reversed, by which the party is put to restore back all he has received, the judgment-creditor cannot liberate himself by merely restoring £100 in the debased currency of the time, but he must give the very same currency that he had received. That proceeds upon the principle, that if the act is to be undone, it must be completely undone, and the party is to be restored to the situation in which he was at the time the act to be undone took place. Upon that principle, therefore, undoubtedly the French Government, by restoring assignats at the end of 13 months, did not put the party in the same situation in which he was when they took from him assignats that were of a very different value."

While the above remarks of the Master of the Rolls were admittedly dicta, the point seems actually to have been presented for determination in a later case (*Johnston's Case*, II Knapp, 336), in which the court delivered upon this question the following judgment:

"And their Lordships are further of opinion, that the subsequent acceptance by Mr. Johnston of the assignats tendered to him by the French authorities in payment affords no answer to the present claim; for as that claim is founded, not upon any alleged breach of contract, but upon a wrong committed, those who did the wrong must (to adopt the language of Sir William Grant, in *Pilkington's case* [2 Knapp, at p. 19]) 'undo their wrong act, and put the party into the same situation as if they had never done it.' The partial

restitution afterwards made can only be considered as reducing the amount of the loss, not as altering the character of the wrong committed or as a satisfaction for the injury sustained. But it has been argued, that the payment in this case having been made by and accepted from the Government itself, varies this case from the one referred to, and that such payment provided that, 'sont exceptés des dispositions mentionnées ci-dessus ceux des dits sujets de sa Majesté Britannique qui, en recevant leurs rentes au tiers après le 30 September 1797, se sont soumis eux-mêmes aux lois existantes sur cette matière.' But their Lordships are of opinion that this case is not affected by that exception, which is expressly confined to one species of compromise, voluntarily entered into between the wrongdoer and the injured party. Whereas the payment in this case was neither made nor accepted by a compromise, but formed a part of the wrongful act itself, and in respect of which Mr. Johnston had as little freedom of choice as in the original drawing of the bill."

The application of these principles to the tort side of the present case leads to the following conclusion: If, to put a supposititious case, the Government of Chile in 1881 required the concessionaries in this case to expend one thousand Chilean pesos worth 90 cents American gold to the peso, the amount of the loss suffered by the concessionaries by such a transaction would be \$900 American gold, and the loss thus suffered could now be equitably met by the Chilean Government only by the payment by that Government of \$900 American gold, plus a reasonable rate of interest from that date until the present. Accordingly, the accounts hereinafter stated have been prepared and stated upon this principle.

*Concerning the contract debt.*—The estimation of the extent of the obligation imposed by the contract depends upon the same fundamental principles.

By the sixth article of the resolution of December 24, 1876, it was provided that—

"In all cases in which sums of money are paid or received, the Chilean peso or the Peruvian sol of stamped silver shall be considered equivalent to the Boliviano, either in this contract or in that regarding the mining concessions."

Speaking of this provision of his contract, Mr. Wheelwright, in his letter of June 28, 1884, to the American Minister in Bolivia, said:

"After repeated interviews with President Frias and the Ministers of Foreign Relations and Finance, I succeeded in securing a recognition in my favor of the sum of (\$870,000) Eight hundred and seventy thousand Bolivianos (hard dollars) leaving open to legal recourse the claim for interest amounting to (\$200,000) Two hundred thousand dollars, more or less. This agreement was duly executed between the contracting parties, under date of the eighth of February 1876.

"The reduction of the indemnity from \$1,087,500 to the sum of 870,000 Bolivianos was occasioned by the word "pesos" (dollars) being tenaciously construed by that Government as "febles" (a depreciated coin), and this being demanded as an initiatory proceeding, I was reluctantly forced to accede thereto. Interest for six months at the rate of eight per cent per annum was paid me in Government drafts, which were duly honored in this city.

"But a brief period elapsed before the Frias Administration was overthrown and General Hilarion Daza became Provisional President. Shortly after, quiet was restored and I returned to La Paz to watch the progress of events, remaining there for some months, until a Cabinet was organized under the new Government.

"This being effected, I sought a conference with the Ministers of Foreign Relations and Finance, during which I was informed by the latter that the acts of the Frias Administration would not be recognized by that of Daza; that any contract of February preceding was null and void; and that, as a preliminary proceeding, the (\$35,000) Thirty five thousand Bolivianos (hard dollars) received by me for interest must be refunded. These dissenting points were discussed at length and finding that no advancement could be made while same were pending, I was compelled to conform thereto, with the compromise, however that, instead of returning the (\$35,000) Thirty five thousand dollars (Bolivianos) in money that sum should be deducted from the principal, and under the dilemma in which I was placed, this seemed in every respect expedient.

"Taking (\$835,000) Eight hundred and thirty five thousand Bolivianos (hard dollars) as a basis of negotiation, and after prolonged discussions, another contract was signed in due form on the twenty-sixth day of December, 1876, and this being the one referred to in the first page of this memorial as that actually binding, I take the liberty of accompanying for your government a translated copy thereof Marked A. Subsequently, administrative authorizations, in support of the "Estacas de Instruccion Publica", i. e.; the Government Silver Mines, were, at my solicitation, issued, but being subsidiary, I merely advert to same herein, although copies can be presented, if deemed advisable.

"As will be seen by perusal of the translated document alluded to, there exist two forms of security, from which payment is to be realized, the first and most important of which relates to Custom House revenue; and more especially so, as not having been able to induce Chile to give me undisturbed possession of the mines, in conformity with the Bolivian decree of twenty third of December 1876, only heavy expenses in maintenance of my rights instead of benefit have been the consequence of my efforts.

"In view of these two pledges, not only entirely distinct, but affecting the territory of both Peru and Bolivia, I suggested to the Minister of Finance that separate decrees be made, and he yielded to my request after being urged, but I regret to say that the separation of guarantees was not made with sufficient clearness as to treat them in the way desired."

It will be observed that this contract by its words, and as understood by one of the parties thereto, appears to provide for . . . the payment of the silver boliviano, the silver Chilean peso, or

the Peruvian silver sol, each of which was to be considered as equivalent to the other for the purpose of the payment of this obligation.

Should it be argued that the Government of Bolivia was entitled to pay this indebtedness in silver bolivianos and that if upon any particular payment the boliviano was worth less than its value at the date of the making of the contract, then and in that event the loss resulting from such depreciation should fall upon the holders of the contract debt, it should be observed in reply that there is not a little law both in England and America going to the point that where a certain sum is, as in this case, recognized as due by a formal instrument, which sum by the tortious act of the debtor is not paid at the due day and payment is thereafter delayed, such sum must be paid in its full value if not of the date of the instrument then at the due date; and that if after the due day payment be offered in a depreciated currency then the creditor is entitled to a proportionate increase to make good the depreciation.

In this connection it is perhaps sufficient to quote, in support of this proposition, from Story on the Conflict of Laws, where the opinions both of civil law and common law jurists are clearly set forth. At page 434, sec. 313, of the work just cited, Judge Story says:

*"Depreciation of Currency.* The question touching the effect of a depreciation of the currency, between the time when the debt is contracted or it becomes due, and the subsequent payment thereof, which was hinted at in the preceding case, has since arisen in a more direct and solemn form and undergone no inconsiderable discussion. The French government, during the war between England and France, had confiscated a debt due from a French subject to a British subject; and subsequently an indemnity was stipulated for on the part of the French government; and there having been a great depreciation of the French currency after the time when the debt was confiscated, the question arose, whether the debt was to be calculated at the value of the currency at the time when the confiscation took place, or subsequently; and it was held that it ought to be calculated at the time of the confiscation. On that occasion the case in Sir John Davies's Reports already alluded to, was referred to, as well as the opinion of foreign jurists on the subject: and Sir William Grant, in delivering the opinion of the court, said: 'Great part of the argument at the bar would undoubtedly go to show that the commissioners have acted wrong in throwing that loss upon the French Government in any case, for they resemble it to the case of depreciation of currency happening between the time that a debt is contracted and the time that it is paid; and they have quoted authorities for the purpose of showing that in such case the loss must be borne by the creditor and not the debtor. That point it is unnecessary for

the present purpose to consider, though Vinnius, whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davies's Reports. He takes the distinction that if, between the time of contracting the debt and the time of its payment, the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money, that is, he may pay in the debased money, being the current coin, but he must pay so much more as would make it equal to the sum he borrowed. But he says if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for 30s., the debtor may liberate himself from a debt of £1 10s., by paying a guinea, although he had borrowed the guinea when it was but worth 21s. I have said it is unnecessary to consider whether the conclusion drawn by Vinnius or the decision in Davies's Reports be the correct one; for we think this has no analogy to the case of creditor and debtor. There is a wrong act done by the French Government; then they are to undo that wrong act, and to put the party in the same situation as if they never had done it. It is assumed to be a wrong act, not only in the treaty, but in the repealing decree. They justify it only with reference to that which as to this country has a false foundation; namely, on the ground of what other governments had done towards them, they having confiscated the property of French subjects; therefore they say we thought ourselves justified at the time in retaliating upon the subjects of this country. That being destitute of foundation as to this country, the republic themselves in effect confess that no such decree ought to have been made, as it affected the subjects of this country. Therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrong-doer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at the value of 50d. he does not make compensation by returning an assignat which is only worth 20d.: he must make up the difference between the value of the assignat at different periods. And that is the case stated by Sir John Davies, where *restitutio in integrum* is stated. He says, two cases were put by the judges who were called to the assistance of the Privy Council, although they were not positively and formally resolved. He says, it is said if a man upon marriage receive 1,000£ as a portion with his wife, paid in silver money, and the marriage is dissolved *causa præcontractus*, so that the portion is to be restored, it must be restored in equal good silver money, though the state shall have depreciated the currency in the mean time. So if a man recover damages, and he levies that in good silver money and that judgment is afterwards reversed by which the party is put to restore back all he has received, the judgment creditor cannot liberate himself by merely restoring 100£ in the debased currency of the time; but he must give the very same currency that he had received. That proceeds upon the principle that if the act is to be undone it must be completely undone, and the party is to be restored to the situation in which he was at the time the act to be undone took place. Upon that principle therefore undoubtedly the French government, by restoring assignats at the



end of thirteen months, did not put the party in the same situation in which he was when they took from him assignats that were of a very different value. We have said that, as this point is not directly or immediately before us, it can make no part in our decree. At the same time it may not perhaps have been without some utility to have given an opinion upon it, inasmuch as it was argued and discussed at the bar. And we think therefore the commissioners have proceeded on a perfectly right principle in those cases in which we understand they have made an allowance for the depreciation of paper-money; and, considering that this case does not differ from those in which they have made that allowance, we are of opinion that the claimants ought to have the same equity administered to them in remunerating them for the loss they have sustained.'<sup>(a)</sup>

"313 b. *Foreign Jurists*. The opinions of Vinnius and Pothier, alluded to in the opinion of Sir William Grant, fully confirm his statements. Vinnius is of opinion that the value of the money at the time when it ought to be paid is the value which is to be allowed to the creditor. Of the same opinion, he adds, are Bartolus and Baldus and De Castro, and indeed jurists generally, with the exception of Dumoulin and Hotomannus and Donellus, who think that the value at the time of making the contract ought to govern. Hence, after having discussed the principle, Vinnius says, in conformity with the opinions of the former jurists: 'Hoc autem fundamento posito, siquidem neutri contrahentium injuriam fieri volumus, ita definiendum videtur, ut si bonitus monetæ intrinseca mutara sit, tempus contractus, si extrinseca, id est valor impositivus, tempus solutionis in solutione facienda, spectari debeat.'<sup>b</sup>

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"<sup>(a)</sup> *Pilkington v. Commissioners for Claims*, 2 Knapp 17-21.

"<sup>b</sup> Vinnius, ad *Instit. lib. 3, tit. 15, Textus, De Mutuo, Com. n. p. 599, ed. 1726*; id. p. 664, ed. 1777, Lugduni. The whole passage deserves to be cited. 'Atque hinc pendet decisio nobilissimæ quaestionis, si post contractum aestimatio nummorum creverit aut decreverit, utrum in solutione facienda spectare oporteat valorem, quem habebant tempore contractus, quæ nunc est tempore solutionis: intellige si nihil, de ea re expresse dictum sit, neque mora intervenierit. Molinæus, Hotomannus, Donellus contendunt, tempus contractus inspiciendum esse, si est, ea aestimatione nummos reddendos, non quæ nunc est, sed quæ initio fuit, cum debantur. Nimirum nihil illi in pecunia numerata præter aestimationem considerandum putant, totamque nummi bonitatem in hac ipsa aestimatione consistere: ac proinde creditori non facere injuriam, qui eandem aestimationem, quam accepit, reddit: tantum enim reddere eum, quantum accepit, quod ad solutionem mutui sit satis. Itaque secundum horum sententiam, si 100 aurei mutuo dati sint, cum aureus valebat asses 50 deddantur autem sum singuli valent asses 55 debitor reddens creditori aureos, 90 aut in singulos aureos 50 asses reddit, quantum accepit, ita liberatur: et vicissim si imminuta sit ad eundem modum accepit, et liberatur: et vicissim si imminuta sit ad eundem modum aureorum aestimatio, non liberatur, nisi reddat aureos 110, aut in singulos aureos asses 55. Bartolus vero (in 1. Paulus. 101 de solut.) Baldus (in 1. res in dotem, 24 de jur. dot.). Castro (in lib. 3, de reb. cred.) et DD. Comm ut videre est apud Boer. decis. 327, contra consent, spectandum esse in proposito tempus solutionis, id est, aucto vel diminuto nummorum valore, ea aestimatione reddi eos oportere, non quæ tunc fuit, cum debantur, sed quæ nunc est, cum solvantur; neque aliud statui posse sine creditoris aut debitoris injuria. Quæ sententia, ut mihi videtur, et verior et

"Pothier holds the opposite opinion, and says: 'It remains to be observed, in regard to the price, that it may be rendered in a money different from that in which it is paid. If it is paid to the seller in gold, the seller may repay it in pieces of silver, or vice versa. In like manner, though, subsequent to the payment of the price, the pieces in which it is paid are increased or diminished in value, though they are discredited, and at the time of their redemption their place is supplied with new ones of better or worse alloy, the seller, who exercises the redemption, ought to repay, in money which is current at the time he redeems, the same sum or quantity which he received in payment, and nothing more nor less. The reason is that in money we do not regard the coins which constitute it, but only the value which the sovereign has been pleased that that they shall signify: "Eaque materia forma publica percussa, usum dominiumque non tam ex substantia praebet, quam ex quantitate." D. 18, 1, 1. When the price is paid, the seller is not

aequior est. Nam quod contrariae sentiae auctores unicum urgent, in nummis non materiae, sed solius aestimationis impositae atque externae, quam ob id vulgo extrinsecam nummi bonitatem vocant, rationem duci, nummumque nihil aliud esse, quam quod publice valet, ut simpliciter verum sit. Utique enim materia numismatis fundamentum est et causa valoris: quippe qui variatur pro diversitate materiae: oportetque valorem huic justa aliqua proportione materiae respondere: neque in bene constituta repub. nummo ea aestimatio imponi debet, quae pretium materiae, ex qua cuditur, superat, aut superet ultra modum expensarum, quae in signanda pecunia fiunt; quod ad singularum specierum valorum parum addere potest. Sed hoc ad actus et praestationes privatorum non pertinet. Illud pertinet, quod so dicimus, creditis nummis nihil praeter aestimationem eorum creditum intelligi, necessario sequitur, creditorem teneri in alia forma aut materia nummos accipere contra definitionem Pauli in d. 1. 99 de solut. etiamsi damnum ex eo passurus sit: nam, qui recipit, quod credit, nihil habet, quod conquaratur. Sequitur et hoc, si contingat mutari nummorum bonitatem intrinsecam, id est, si valore veteri retentio percutiantur novi nummi ex deteriore materia, quam ex qua cusi, qui dati sunt, puta, si qui dati sunt, cusi fuerint ex puro auro, postea alii feriantur ex auro minus puro et mixto ex aere, debitorem restituendo tot mixtos et contaminatos, quot ille puros accepit, liberari cum insigni injuria creditoris: et contra interpp. pene omnium doctrinam, qui hoc casu solutionem faciendam esse statuunt ad valorem intrinsecum monetae, qui correbat tempore contractus, testibus Gail. 2, obs. 73, n. 6 and 7. Borcholt. de feud. ad cap. un. quae sunt regal. num. 62. Illud enim maxime in hac disputatione considerandum est, quoniam hic finis nummi principalis est, ut serviat rebus necessariis comparandis, auctore Aristotle, 1 Polit. 6, quod mutata monetae bonitate sive extrinseca, sive intrinseca, pretia rerum omnium mutantur, et pro modo auctae aut imminutae bonitatis nummorum crescant aut decrescant: quod ipsa docet experientia: eoque facit 1. 2 C. de vet. num. pot. lib. 11. Crescunt rerum pretia, si deterior materia electa, aut manente eadem materia valor auctus sit: decrescunt electu materiae melioris, aut si eadem bonitate materiae manente valor imminutis fuerit. Fallitur enim imperitum vulgus, dum sibi persuadet, ex augmento valoris aurei aliquid sibi lucri accedere. Hoc autem fundamento posito, siquidem neutri contrahentium injuriam fieri columus, ita definiendum videtur, ut si bonitas monetae intrinseca mutata sit, tempus contractus si extrinseca, id est, valor imposititius tempus solutionis in solutione facienda spectari debeat. Atque ita saepissime judicatum est.'"

considered to receive the particular pieces, so much as the sum or value which they signify; and, consequently, he ought to repay, and it is sufficient for him to repay, the same sum or value in pieces which are current, and which have the signs authorized by the prince to signify that value. This principle being well established in our French practice, it is sufficient merely to state it. It cuts off all the questions made by the doctors concerning the changes of money.'''<sup>a</sup>

With these observations and principles in mind, the Government of the United States begs to set forth the following statement of the legal situation in this case:

(a) As already pointed out, this debt due under the contract of December 26, 1876, would, save for the tortious act of Chile, have been completely paid and discharged by the end of 1882; this date is, therefore, under the circumstances of this case, the due date of the contract.

(b) The value of the silver boliviano during the time that payment upon the contract debt would have been made, and within which it would have been satisfied had not the Government of Chile intervened, varied from \$0.965 to \$0.823 American money.<sup>b</sup>

(c) Therefore, in estimating the value of the debt due from Chile, the Government of the United States is entitled to compute the real value of the boliviano at the precise time each payment would have been made. It will, however, for the sake of simplicity and utmost equity, adopt the lowest value (namely .823) to which the boliviano fell during the above named period within which complete payment would have been made had not the Government of Chile intervened and tortiously appropriated the customs receipts.<sup>b</sup>

(d) In computing the amount of money which would have been received by Wheelwright at this time, had the Government of Chile not tortiously intervened in the payment thereof, there must be considered, first, the principal sum of 835,000 bolivianos, and, second, interest on that sum at the rate of 5 per cent per annum,<sup>c</sup> from the date of the contract until the end of the year 1882. These two sums, reduced to American gold at \$0.823 for each boliviano (the value of the Boliviano in 1882), equal \$893,837.20, the value of the debt at the time when it would have been paid but for the tortious act of the Government of Chile.

<sup>a</sup> Pothier, *Traité du Contrat de Vente*, n. 416. I quote from Mr. Cushing's excellent translation, n. 419, p. 264, 265. See Pardessus, tom. 5, art. 1495, p. 269-271. [Story's Note.]

<sup>b</sup> For statement showing the bullion value of the Boliviano peso and Peruvian sol, see I Appendix, p. 478.

<sup>c</sup> It will be recalled that the original obligation due from the Government of Bolivia to Wheelwright drew interest at 8% compoundable, and that in the contract of December 26, 1876, this was reduced to the rate specified therein, namely, 5%.

(e) To this sum thus due at this time, namely, January 1, 1883, there must be added, under the principles set forth under 1, *supra*, interest at 6 per cent, the legal rate, since from this date, January 1, 1883, Chile stands as a tortfeasor who has converted money belonging to another and who must therefore pay the legal and not the contract rate of interest, the contract for this purpose being non-effective.<sup>a</sup>

(f) This principal sum of \$893,837.20, plus interest thereon at 6 per cent for twenty-six years and eleven months, the principal and interest totaling \$2,337,384.28, less the credit mentioned hereafter, should be awarded in American gold or its equivalent in such currency as may be designated.

(3) *The costs of litigation in suits resulting in a denial of justice should be regarded as proper elements in a claim for damages and an award should be made to cover the same.*

The soundness of this proposition is attested by numerous precedents, some of the more important of which are gathered below:

"By a convention signed at Lima March 17, 1841, by James C. Pickett, chargé d'affaires of the United States, and Don Manuel del Rio, acting minister of the department of Finance of Peru, the Peruvian Government agreed to pay to the United States the sum of 300,000 'hard dollars,' of the same standard and value as those then coined at the mint at Lima, in full satisfaction of claims of the United States 'on account of seizures, captures, detentions, sequestrations, and confiscations of their vessels, or for the damage and destruction of them, of their cargoes, or other property, at sea, and in the ports and territories of Peru, by order of said Government of Peru, or under its authority.'"

\* \* \* \* \*

"In the case of the ship *General Brown*, to which reference has heretofore been made, the sum of \$454,091.18 was claimed, with interest, on account of the wrongful confiscation of the vessel and cargo. The claim included items not only for the value of the ship and cargo, and for freight, but also for the loss of profits on the voyage. The Attorney-General allowed: For the value of the vessel, \$40,000; for the value of the cargo at the time and place of seizure, \$139,036; for freight earned on the cargo prior to its seizure, \$14,000; for the return of the crew and for the expenses of legal proceedings in Peru, \$8,732.18; total, \$201,768.18."

(Moore's International Arbitrations, Vol. 5, pp. 4591 and 4598.)

A similar precedent is to be found in the arbitration between Great Britain and the Netherlands Government in the case of the *Costa Rica Packet*. The facts and circumstances of that case,

<sup>a</sup> See I Appendix, p. 481.

as reported by Mr. Moore in his International Arbitrations (vol. 5, pp. 4948 and 4950), are as follows:

"By a convention signed at The Hague May 16, 1895, the Governments of Great Britain and the Netherlands agreed to submit to arbitration the claims preferred by the former against the latter growing out of the arrest and precautionary detention in the Netherlands Indies of Mr. Carpenter, master of the whaling ship *Costa Rica Packet*, of Sydney, New South Wales. To this end the contracting parties agreed 'to invite the government of a third power to select from its subjects a jurist of undoubted repute' to act as arbitrator. An invitation was accordingly extended to the Government of Russia, which named as arbitrator Mr. F. de Martens."

\* \* \* \* \*

"On the whole the British Case maintained that the proceedings against Captain Carpenter were destitute of reasonable cause and oppressive, and demanded damages as follows: For the crew, £8,000, which represented their share of the prospective profits; for the owners, £16,094 18s. 10d., representing expenses and loss of anticipated profits; for Captain Carpenter, £7,500, including £2,000 for loss of profits, £500 for expenses in defense and in traveling, and £5,000 for 'the arrest and imprisonment, the indignities, mental pain, and anxiety suffered, the loss and injury to his reputation, health, and credit, loss of time, etc.'"

\* \* \* \* \*

The arbitrator, Mr. F. de Martens, made upon this case the following award:

"For these reasons:

"I declare the Government of Her Majesty the Queen of the Netherlands responsible, and I, consequently, fix the indemnity to be paid at \* \* \*

"The sum total of 3,150 £ to Captain Carpenter.

"The sum total of 1,600 £ to the officers and crew.

"The sum total of 3,800 £ to the owners of the vessel *Costa Rica Packet*—

"With interest on all these damages at the rate of 5% per annum, from the 2nd of November 1891, the date of the illegal arrest of Captain Carpenter, and I put the expenses at the total sum of 250 £, to be paid by the Government of Her Majesty the Queen of the Netherlands.

"Done at St. Petersburg, in duplicate, the 13th (25th) February, 1897.

"MARTENS."

Another instance in which damages were awarded for expenses incurred is narrated by Mr. Moore in his Digest of International Law, Vol. VI, p. 730-731. In this case Mr. G. F. B. Jenner, British Minister to the Central American States, acting as arbitrator, made the following award:

"1. \$55,287.79 for subsidies earned, works executed, and expenses incurred under the contract of April 5, 1898.

"2. \$6,874.11 representing interest thereon at 6% from Oct. 21, 1898, to the date of the award.

"3. \$41,588.83 for profits that would have been earned had not the Government prevented the performance of the contract.

"4. \$40,000 as 'indemnity for expenses incurred, two years' time lost, suspension of credit, and grave anxiety of mind.'"

In still another case, that of Baldwin against Mexico, the Commission under the convention between the United States and Mexico of April 11, 1839, on a claim presented for damages for illegal imprisonment, indignity, injuries, etc., made an award which is set forth by Mr. Moore in his *International Arbitrations* (vol. 4, p. 3240) as follows:

"The American commissioners maintained that, without considering whether the determination of the judge to imprison Dr. Baldwin was just and in conformity with law, or whether he had committed a crime, it was certain that for such offenses he had suffered a disproportionate punishment. As to the charge of firing the shot, it was disproved. While he had a gun with him, it was found, when he was arrested, to be loaded. The American Commissioners awarded (1) for the outrage on Baldwin's person, by placing him in the stocks with a broken leg and then detaining him in prison as a criminal for eighty-four days, \$20,000; (2) for permanent incurable injury to his leg, \$10,000; (3) for the interruption of his business, and the injury to him as a merchant, \$10,000; (4) for the expenses necessarily incurred in consequence of his criminal prosecution, and in the presentation of his claim, \$5,000; and (5) for costs of translation and consulting a physician, \$174.75—in all, \$45,174.75.

"The umpire, February 23, 1842, adopted the award of the American commissioners." <sup>a</sup>

The same principle was applied by the commissioners sitting under this convention in the case of the *Louisa*. Mr. Moore has set forth the facts of that case, as well as the award thereon, in the following language:

"The ship *Louisa*, the property of citizens of the United States, was seized at Acapulco in January 1821, by order of the Iturbide, for the use of the Mexican Government; and both the ship and the cargo were in like manner ordered to be paid for. Only a part of the money, however, was paid, and for many years the owners fruitlessly prosecuted a claim for the remainder. Their claim having been submitted to arbitration, the American and Mexican commissioners agreed to award a certain sum as damages resulting from the taking of the ship and cargo, and also to award the sum of \$7,750 for the expenses incurred by the claimants in their

<sup>a</sup> The convention provided that the arbitrator should be appointed by the King of Prussia, who on the 29th of August, 1840, designated Baron Roenne, then Minister resident of Prussia at Washington. (Moore's *International Arbitrations*, vol. 2, p. 1224.)

efforts to obtain payment of what was due them. On the former sum the commissioners allowed interest at 5 per cent from the time the principal first became due, but they differed as to the allowance of interest on the award for expenses. The umpire, April 9, 1841, 'discharged' the Government of Mexico 'from the demand of interest on the said sum of \$7,750.'"

(Moore's International Arbitrations, vol. 4, p. 4325.)

Still another case is that of the *William Lee*, a whaling ship. The case was presented to the Commission under the convention between the United States and Peru of January 12, 1863, which arose out of the detention of the ship for three months by the captain of the port, who refused to give the master a clearing. The Commission gave upon this claim the following award:

"Including, then, in the determination of damages the loss of the whaling season to the *William Lee*, the \$4,000 for repairs, \$1,500 for all expenses during detention, and interest on all losses from the release of the ship in December 1885, at the rate of 6% per annum, the commissioners award to the owners of the whale ship *William Lee* twenty-two thousand dollars (\$22,000) in the current money of Peru, or its equivalent in the current money of the United States."

(Moore's International Arbitrations, vol. 4, p. 3407.)

In the case of Dr. Marion A. Cheek against Siam an award was made by Sir Nicholas J. Hannen (Chief Justice of the Straits Settlements), sole arbitrator, March 21, 1898, of ticals 706,721—one item of which is stated to be "for costs of recovering ticals 686,137 at 3 per cent, [ticals] 20,854." (Moore's Inter. Arbs., vol. 5, pp. 5072, 5073.)

In a memorandum by the arbitrator (Moore's Inter. Arbs., vol. 5, pp. 5069-5072), he says:

"I think that the Cheek estate is entitled to be paid for the costs of recovering the amount which I find is due to it. Dr. Cheek estimated these at 3 per cent on the amount, and this is the sum which I purpose to allow the estate under this head."

This principle was also recognized and applied by the Commission created under the act of Congress of February 25, 1831 (4 Stats. 446), to carry into effect the convention of March 28, 1830, between the United States and Denmark. The Commission, finding that its rules would not operate equally upon the various classes of claims presented, changed at its *sixth session* these rules of decision (which it had published at the close of its fourth session), set aside all decisions which had been made in conformity with those rules, and proceeded to make awards in accordance with a series of amended rules. On the 22nd of March, 1833, the new rules, which

read as follows, were ordered to be entered on the minutes of the Commission:

“That in all cases of *condemnation* there shall be allowed,

“1st. The value of the vessel agreeably to the following scale:

“For Eastern vessels, \$40.00 per ton.

“For Northern vessels, \$60.00 per ton.

“2nd. The value of the cargo at the cost of the same in the port from whence she sailed, agreeably to the invoice, without any addition to the invoice for freight or insurance.

“3rd. A premium of insurance, at the rate of eight per cent upon the value of the vessel and cargo.

“4th. Freight, for the voyage in which the loss occurred, at the rate of twelve dollars per ton.

“5th. Demurrage, on the following scale:

“\$15.00 per day for vessels under 150 tons.

“\$20.00 per day for vessels between 150 and 200 tons.

“\$25.00 per day for vessels between 200 and 300 tons.

“\$30.00 per day for vessels over 300 tons.

“That, in all cases of *detention* of vessel and cargo, there shall be allowed as follows:

“1st. Freight, at the rate of six dollars per ton.

“2nd. Premium of insurance, at the rate of eight per cent upon the value of vessel and cargo, respectively, at the commencement of the voyage.

“3rd. For the detention of the vessel, for demurrage:

“\$20.00 per day on vessels under 150 tons.

“\$25.00 per day on vessels between 150 and 200.

“\$30.00 per day on vessels between 200 and 300.

“\$40.00 per day on vessels over 300 tons.

“That for detention of cargo there shall be allowed for damages, at the rate of twelve per cent per annum; and in cases of detention where special damages shall be proved, as where the cargo was in whole or part of a perishable nature or was wasted or destroyed, an additional allowance shall be made according to facts.

“This allowance to be in full for all injuries resulting from capture and detention, including cases in which voyages were broken up, and all other speculative or consequential damages.

“*In all cases the expenses incurred in defending the vessel and cargo in the course of judicial investigation shall be allowed in full, but no other claim for expenses shall be allowed.*

“In all cases where the claim is presented by an underwriter, he shall receive no other or greater allowance for the loss or detention of vessel—cargo—or freight, than would have been allowed to the owner agreeably to the foregoing rules.” Moore’s *Inter. Arbs.*, vol. 5, pp. 4568, 4569.

Finally, in the case of the El Triunfo Company, Ltd., against San Salvador (Moore’s *International Arbitrations*, vol. 6, pp. 649, 731), the arbitrators, Sir Henry Strong, Chief Justice of Canada, and Mr. Don M. Dickinson, made an allowance of \$2,671.31 for the expenses of the Company in endeavoring to secure restoration before intervention by the United States; \$18,864.77 for expenses



of prosecuting the claims, exclusive of attorney and counsel fees, and \$60,000 for attorney and counsel fees—the total award being \$523,178.64. (For. Rels. 1902, pp. 859–861.)

See also *The Apollon*, 9 Wheat. 362; Cyc. of L. & P., vol. 11, p. 134, and cases there cited.

It is submitted that these precedents conclusively establish that damages should be awarded in this case to cover the cost of the litigation undertaken by Wheelwright in the Chilean courts in an unsuccessful endeavor to secure a proper recognition of his rights, titles, and interests in the government estacas located in the Bolivian Littoral.

*Sub-Point A.*

Damages are due to the concessionaries in this case by reason of the failure, on the part of the Government of Chile, properly to recognize, observe, and enforce the rights, titles, and interests possessed by the concessionaries in the government estacas located in the Bolivian Littoral, upon and subsequent to the assumption of possession and control of this Littoral by the Chilean Government. These damages are divisible as follows:

A<sup>1</sup> Damages arising from the failure of the courts of the Government of Chile to adjudge to Wheelwright the possession and enjoyment of certain government estacas to which he was entitled under the Bolivian laws.

As was pointed out and fully discussed under Point II, Sub-Point E, *supra*, the Government of Chile through its administrative officers and its courts applied to the Bolivian Littoral the provisions of the Chilean law, notwithstanding such law derogated from and confiscated certain well defined rights, titles, and interests possessed by the concessionaries under their contract with the Bolivian Government of December 26, 1876, which rights, titles, and interests had already vested and accrued at the time the Chilean forces took possession and the Chilean Government assumed control of the Bolivian Littoral. Again, as has been already pointed out, the Chilean courts, in the case of the *Amonita*, held that the government estacas were denounceable, and in the case of the *Justicia*, that the concessionaries were not entitled to the government estacas unless they had already taken actual possession of such estacas at the date of the occupation of the Littoral by the Chilean Government. And finally, as was conclusively shown under Point II, Sub-Point E, *supra*, both of these decisions of the courts were contrary to the rights enjoyed by the concessionaries and resulted in the infliction of serious damage upon them.

It has been impossible for the Government of the United States to obtain absolutely accurate figures as to the amounts which were taken not only from the estacas *Amonita* and *Justicia* of which the concessionaries were thus deprived under and pursuant to the judgments in those cases, but it has also been impossible for the Government of the United States to determine the exact amount which has been taken from the government estacas other than the *Amonita* and the *Justicia* to which the concessionaries were entitled, and of which they were deprived by reason of the above named decisions of the Chilean courts. There appears to have been no official record made of the production of the mines in the Bolivian Littoral. It has therefore been necessary to base the computations upon semi-official and non-official statistics and authorities, and the Government of the United States has at all times, in order to make certain it was well within the actual figures, taken the lowest estimates given.

In making this computation, the Government of the United States has estimated, so far as it was able from the statistics at hand, the amount produced by each mine possessing and exploiting part or all of one of these government estacas; it has then assumed that the government estaca was one of four composing such mine, and therefore that one-fourth of the total production of the mine came from this government estaca, which was thus the fourth part of the mine. In the case of the *Justicia*, however, some variation from this rule was necessary because of the conflict of title existing as to that estaca. In the case of the *Justicia* one-fourth of the proceeds of each mine participating in the wealth of that estaca has been taken.

Moreover, while the Government of the United States has not, by reason of the facts above set forth regarding statistics, been able to assure itself that it has secured statements and statistics regarding all government estacas to which the concessionaries were entitled and of which they were illegally deprived, it has been able to secure and hereby presents the statistics set forth below regarding the following government estacas.

This data has been compiled from the personal knowledge and information of engineers familiar with the conditions in the Littoral, as well as from statistics taken from the "Estadística Minera de Chile," Volume II (1904-1905), page 225, et seq., and from a book published by the Sociedad de Minería de Chile, and written by Mr. Felipe Labastie, who in turn compiled his data from Mr. José Tomas Cortes and other engineers and miners."

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<sup>a</sup> For Mr. Jackson's affidavit see I Appendix, p. 526.

*Estaca Justicia*.—Erroneously adjudicated to trespassers on the ground that the concessionaries were not actually in possession of the estaca at the time of the occupation of the Littoral by the Chilean Government. This estaca was occupied and divided between six different mines, as follows:

<i>Justicia</i> mine proper, yielding a profit of . . . . .	\$385,500.00
<i>Demasias Fisher</i> , or <i>Carmela</i> , " " " " . . . . .	25,000.00
<i>Caracoles</i> , or <i>Fusion</i> , " " " " . . . . .	17,500.00
<i>Cleopatra</i> , profits not known.	
<i>Saturnina</i> , " " " " . . . . .	
<i>Tarija</i> , " " " " . . . . .	
	<hr/>
	\$428,000.00

*Estaca Blanca Torre*.—This was the estaca involved in the *Amonita* suit, which was erroneously adjudged to a trespasser on the improper ground that the government estacas were denounceable. The mines involved in the extraction of the metals from the *Blanca Torre* were the following:

<i>Blanca Torre</i> , the net profit of which was . . . . .	\$107,815.00
<i>Amonita</i> , " " " " " " . . . . .	12,000.00
	<hr/>
	\$119,815.00

*Estaca Esmeralda*.—This estaca was finally recovered by the concessionaries, but not until all of the ore had been taken out by the *Esmeralda del Sur*.

The *Esmeralda del Sur* left a profit of . . . . . \$150,000.00

*Estaca Desempeño*.—This estaca was seized by the *Patria*, which mine produced a net profit of . . . . . \$85,200.00

*Estaca Limbo*.—This estaca was taken by the *San Rafael* mine, which mine was finally purchased for the concessionaries, but not until the greatest part of the metal had been extracted.

The *San Rafael* produced . . . . . \$34,800.00

The following estacas were also lost before they could be taken possession of, and the mines working them yielded the profits shown:

<i>Estaca San Juan</i> , taken by <i>San Pedro</i> , which left . . . . .	\$30,000.00
<i>Estaca Luzdel Pilar</i> , " " <i>Brazil</i> , " " . . . . .	90,000.00
<i>Estaca Patriota</i> , " " <i>Italia</i> , " " . . . . .	24,000.00
<i>Estaca Tehualda</i> , " " <i>Guacolda</i> , " " . . . . .	71,300.00
<i>Estaca Colorada</i> , " " <i>Alerta</i> , " " . . . . .	259,200.00
<i>Estaca Olivia</i> , " " " " . . . . .	30,000.00
<i>Estaca Carmelita</i> , " " " " . . . . .	" 9,000.00

The total produced by these mines exploiting government estacas to which the concessionaries were entitled, expressed in Chilean currency, was..... \$1,331,315.00

Calculating, in accordance with the rule above set forth, that 25 per cent of this came from the government estacas the amount which should be divided between the Government and the concessionaries would equal..... \$332,828.75

While the exact date at which these various sums belonging to the concessionaries were taken from these estacas cannot be given, it is certain that all of these estacas were worked out long before the year 1890. Taking January 1, 1890, as the very latest date at which these mines were finally operated, it will be observed that the concessionaries have been deprived of 60 per cent of this output, namely, \$199,697.25 (Chilean paper pesos), from that date until the present, and that the deprivation of the use of that money for this period of time was due to the erroneous judgments of the Chilean courts. This sum, reduced to American currency (the mean value of the Chilean paper currency for this period being 67 cents), equals..... \$133,797.16

There is therefore due from the Government of Chile to the concessionaries, under all principles of equity and fair dealing, as well as upon strict legal principles, interest on the last named sum from 1890 until the date of the signing of the protocol, which, at 6 per cent per annum, totals..... 200,026.75

Total principal and interest.. .....<sup>a</sup> \$333,823.91

**A<sup>2</sup> Damages arising from the wrongful application, by the Chilean courts and officials, to the government estacas held by the concessionaries under their contract, of those provisions of the Chilean mining law which related to and governed the denouncement of mines for abandonment.**

By reason of the application to the government estacas of the Littoral of those principles announced by the court in the case of the *Amonita* (see Point II, Sub-Points D and E, *supra*), it became necessary, in order to avoid denouncement of other mines, for the concessionaries to expend (contrary to the rights, titles, and interests of the concessionaries, and in violation of the principles of law involved) large sums of money for the working of these mines under the Chilean law. The total amount of money so expended

<sup>a</sup>I Appendix, p. 482.

equaled \$36,498.93. These amounts were all expended after the occupation of the Littoral by the Chilean forces in 1879 and before January 1, 1885. During this period the mean value of the Chilean peso was 67 cents American gold.

Upon this basis the sum spent in working these mines	
equaled on January 1, 1885, American gold . . . . .	\$24,454.28
Interest on this amount from January 1, 1885, to	
December 1, 1909, equals . . . . .	36,559.15
Total . . . . .	<sup>a</sup> \$61,013.43

**A<sup>3</sup> Damages arising by way of disbursements for expenses of litigation made necessary by reason of the improper application to the government estacas of various provisions of the Chilean mining law (said expenses including court fees, witness fees, and attorney's fees), as well as for necessary increase of working staff in order adequately to protect the interests of the concessionaries.**

The full amount of disbursements for litigation made necessary by reason of the improper application to the government estacas of the various provisions of the Chilean mining law, said expenses including court fees, witness fees, and attorney's fees, totals, with interest calculated upon the various sums paid out each year from the end of that year until December 1, 1909 . . . . . \$48,340.91

Damages arising, as above set forth, by reason of the necessary increase of working staff in order adequately to protect the interests of the concessionaries, computed in the same way . . . . . \$65,359.89

Total damages in tort (reckoned in American gold)—

Sums taken from government estacas to which concessionaries were entitled (with interest from Jan. 1, 1890, to Dec. 1, 1909) . . . . .	\$333,823.91
Sums paid out to avoid denouncements of mines (with interest from Jan. 1, 1890, to Dec. 1, 1909) . . . . .	61,013.43
Legal expenses (with interest from date of expenditure to Dec. 1, 1909) . . . . .	48,340.91
Expenses of increased working force (with interest from date of expenditure to Dec. 1, 1909) . . . . .	65,359.89

Total . . . . . <sup>b</sup>\$508,538.14

<sup>a</sup> I Appendix, p. 484.

<sup>b</sup> I Appendix, p. 490.

*Sub-Point B.*

**Damages are due to the concessionaries in this case upon the contract debt which was recognized by the Wheelwright contract as due to the concessionaries in the following amounts:**

There is due to the concessionaries in this case, upon the contract debt recognized as due under the contract of December 26, 1876, (1) the principal and the interest provided for in said contract, said interest to be calculated to the date when such debt would have been paid but for the tortious act of Chile in appropriating the customs receipts set apart by Bolivia to the payment of this obligation; and (2) interest on such total sum so due, from the time when it would have been paid but for this tortious act of Chile until the award is paid.

As has been already fully discussed under Point III, the Government of Chile is under obligation to pay to the Government of the United States, for and in behalf of the claimants, the debt above described—(1) because under the general principles of law and equity fundamental to the judicial systems of the two countries, as well as under the rules and principles of international law and of international practice, the Government of Chile by deliberately and with knowledge appropriating funds which had been specifically set apart and appropriated to the payment of the original obligation, has become obligated to pay said obligation; (2) because the Government of Chile has repeatedly undertaken to the Government of Bolivia to meet such obligation, the Government of the United States for and in behalf of the claimants having by reason of these obligations the rights of a beneficiary under these formal and solemn obligations; (3) because the Government of Chile has made to the Government of the United States many solemn diplomatic undertakings and agreements repeatedly renewed to satisfy this obligation.

The contract of 1876 recognized as due to the claimants 835,000 bolivianos, which was to bear interest at 5 per cent from date until paid. As has been shown under Point III, Sub-Point A, *supra*, this debt would have been fully paid at least by the end of 1882 had not the Government of Chile seized and used the money coming from the Arica customs receipts which had been appropriated

for the payment of this debt. The value of this debt at the end of 1882, reduced to American gold, was:

Principal.....	\$687,205.00
Interest.....	206,632.20
Total.....	893,837.20

From this date, i. e., from January 1, 1883, to December 1, 1909, the concessionaries have been deprived of this amount of money, upon which, therefore, they ought to receive interest for the reasons already given and at the rate already stated above, namely, 6 per cent, the legal rate of interest.<sup>a</sup>

Interest upon \$893,837.20 for 26 yrs. and 11 months at

6%, equals .....	\$1,443,547.08
The total amount due on the debt is therefore.....	2,337,384.28

Against this sum there should be placed the following credits:

The following estacas were worked by the concessionaries at a profit, the exact amount being indicated after each estaca:

	Year.	Chilean paper.	Exchange.	U. S. gold.
Al fin Hallada .....	1882	\$7,144.70	71.63	\$5,117.75
Mapocho.....	1886	5,828.16	46.76	2,725.25
Reventon .....	1890	30,050.30	48.73	14,643.51
Rosales .....	1882	7,650.35	71.63	5,479.95
San Rafael (S. G.) .....	1886	6,488.40	46.76	3,033.98
Santa Isabel.....	1886	30,142.82	46.76	14,094.78
		87,304.73		45,095.22

The contract provided that 40% of these net proceeds should be credited to the Bolivian Government on the debt of the capital account. 40% of \$45,095.22 ..... \$18,038.09  
To this must be added 6% simple interest up to Dec. 1, 1909, as follows:

On 40% of \$5,117.75 or \$2,047.10 for 26 years and 11 months.....	\$3,306.07
On 40% of \$2,725.25 or \$1,090.10 for 22 years and 11 months.....	1,498.89
On 40% of \$14,643.51 or \$5,857.40 for 18 years and 11 months.....	6,648.15
On 40% of \$5,479.95 or \$2,191.98 for 26 years and 11 months.....	3,540.04
On 40% of \$3,033.98 or \$1,213.59 for 22 years and 11 months.....	1,668.69
On 40% of \$14,094.78 or \$5,637.91 for 22 years and 11 months.....	7,752.13

Total interest account..... 24,413.97

Total amount of this item..... <sup>b</sup> 42,552.06

<sup>a</sup> I Appendix, p. 481.

<sup>b</sup> I Appendix, p. 490.



The total amount due, therefore, upon the contract debt is as follows:

Total amount due on the debt as per above statement..	\$2, 337, 384. 28
Amount to be credited on this account as per the above statement of proceeds derived from certain mines worked at a profit. ....	42, 552. 06
Amount still due upon the debt. ....	2, 294, 832. 22

The Government of the United States, therefore, prays for judgment in the following amounts, which represent the actual losses sustained by the concessionaries in this case by reason of the wrongful deprivation by the Government of Chile of certain rights, titles, and interests held by the concessionaries in certain government estacas granted to them by a contract between the concessionaries and the Government of Bolivia under date of December 26, 1876; and also on account of the principal and interest of the debt recognized as due and payable from the Government of Bolivia to the concessionaries under and pursuant to the terms of the same contract above named:

On the tort side of the claim. ....	\$508, 538. 14
For the contract debt. . . . .	2, 294, 832. 22
Grand total due from Chile. ....	2, 803, 370. 36

Upon the final award made by the Amiable Compositeur in this case, there should be also awarded interest at 6 per cent upon said award from Dec. 1, 1909 (the date to which the interest in the above account is carried), until the award is fully and finally paid.

In addition to this amount the Government of the United States feels that there should be awarded to the concessionaries in this case a reasonable sum for legal expenses in prosecuting the claim since it became a matter of diplomatic representation. In this connection it should be observed that the sole surviving partner of Alsop & Co. has since 1890 found it necessary continuously to employ and retain the services of efficient counsel, and that in addition to counsel so employed, various of the claimants have also retained special counsel to represent their interests.

Concerning the item of 240,700 bolivianos recognized by the Wheelwright contract as due to the concessionaries, for interest accrued and unpaid prior to December, 1876, it will be recalled that the contract provided that this amount should be paid from the proceeds of two mines, one of which, the Flor del Desierto, was designated, and the other of which was to be desig-

nated later, the mine actually chosen being the Disputa. The following account will show that while these mines never produced a sufficient amount to pay off this interest, yet they did produce something, and it is believed sufficient to discharge this obligation under the terms of the contract.

Accrued interest recognized by contract .....	\$230,700.00
Against this should be credited the following sums:	
Fifty per cent of \$184,240.80—the proceeds derived from the operation of the Flor del Desierto .....	\$92,120.40
Forty per cent of \$107,663.74—the proceeds derived from the operation of the Disputa. ....	43,065.496
	<hr/>
	135,185.896
Balance still due. ....	95,514.104 . . . .

The Government of the United States desires, in connection with this prayer for judgment, to direct particular attention to the following considerations:

(a) There is not in the amount prayed in judgment above one penny which represents a penalty. Every penny of the amount represents losses actually sustained by the concessionaries in this case.

(b) In estimating the damages on the tort side of the claim as above set forth, there is not one penny of speculative profits. Every penny represents either an actual expenditure by the concessionaries, or a loss of money which was actually taken from mines to which they were entitled. It is true that as to the amounts taken from such mines the figures are not as accurate as could be wished, but they are as accurate as could be obtained; and in each case they apply to mines that were actually exploited and to the money actually taken from such mines.

(c) As to the contract debt, it must be observed that in the whole course of the correspondence between and among the Governments concerned it has never been once alleged that the amount called for by the contract was not legally and equitably due, subject to a statement of account regarding the operations of the mines. Moreover, it should be observed that the Government of Chile has repeatedly undertaken an examination into the merits of this claim, as that Government specifically stated in connection with the negotiations attendant upon the treaty of 1895; and it is a matter of record that the Government of Chile was at that time furnished with the antecedents of the case. It must be

assumed that the information developed at that early time was not lost in the negotiation of the subsequent treaty of 1904.

But upon this point we are not obliged to rely upon surmises or upon reasoned deductions to show that the Government of Chile has no defense to the merits. The correspondence shows that in 1908 and 1909 the Government of the United States, always desiring that its representations in this case should be in accordance not only with its legal rights, but with the strictest and most absolute equity of the situation, and observing that the Government of Chile was persistently offering in settlement of the entire obligation sums grossly insufficient to meet even the principal of the debt, requested, after setting these things forth, that the Government of Chile, if it had any evidence going to show that the full amount called for by this contract were not equitably due, should furnish to the Government of the United States the evidence upon which it relied to support its position. The Government of the United States having waited for three months without receiving a reply, the matter was again called to the attention of the Government of Chile. Finally, after a delay of eight months, the Government of Chile explained that it had no evidence going to show that the full amount called for by the contract was not legally and equitably due the claimants, and justified its offers theretofore made in settlement of the claim by citing the terms of the treaty of 1904 between Bolivia and Chile, always excluding the secret notes which were exchanged by the plenipotentiaries.

Considering that this statement was secured after a correspondence of so many months, and after, it must be assumed, the most careful examination of the entire claim at that time, and certainly, if we may rely upon the correspondence passing between the two Governments, after a most thorough examination made many years earlier; and considering further that this statement should be taken in connection with the fact that the Government of Chile has, by its repeated offers of payment, and by its repeated statements—one of them before an international tribunal—that it would undertake to pay this obligation, which it recognized as a valid and binding obligation which it should meet, it is confidently believed that this admission of no defense to the merits of this case can leave the Amiable Compositeur in no doubt as to the full liability of the Government of Chile in this case, and must eliminate from the consideration of the Amiable Compositeur all questions save that of the amount of the liability.

(d) Moreover, and further, it must be always remembered on this question of amount, in connection with this admission of the Government of Chile, thus made after repeated examination—that it had no evidence going to show that the claim was not entirely meritorious—that the Government of Bolivia also has never questioned its legality or equity, and it must therefore be assumed that the claimants are equitably entitled to receive from one of these two Governments an amount sufficient to cover their entire losses, as those losses have been hereinbefore set forth.

In this connection it will perhaps be not amiss to make a closing remark regarding the broad equities of the situation with reference to *what* debtor ought in justice to be charged with the satisfaction of this obligation. The Government of Chile upon the discovery of guano deposits in the Bolivian Littoral early made claim to the vast region within which these deposits occurred. A diplomatic controversy arose almost immediately and continued from that time until the final absorption of the territory by the Government of Chile at the end of the War of the Pacific. Meanwhile, however, by two solemn treaties, one in 1866 and the other in 1874, the territory in dispute had been definitely apportioned between the two contending Governments. From 1866 until the close of the War of the Pacific, the Government of Bolivia dealt with the territory in question as her own, as indeed it was. At the close of that war the Government of Chile took over this territory, and also appropriated the Bolivian customs receipts derived from Pacific ports. As has been pointed out above, the Government of Chile derived from these customs receipts, in addition to the 25 per cent with which she repaid herself for the cost of administration, *more than sixteen millions of dollars*. From the nitrate fields, the guano deposits, and the mines of precious metals which she secured from Bolivia at the end of the war, all located in this same Littoral, the Government of Chile has secured a further net sum of some *two hundred millions of dollars*. It is true that the Government of Chile did but exercise a belligerent right when at the close of the war she insisted upon the retention of the Bolivian Littoral as compensation, but it is also true that the retention of this region by Chile deprived Bolivia of her richest territory. The Government of Chile has in her correspondence repeatedly recognized this fact, and not without a sense of equity and justice has repeatedly promised the Government of Bolivia that she would liquidate and discharge various obligations,

among them the claim of the Alsop concessionaries, for the liquidation of which the Government of Bolivia had looked to the revenues to be derived from the Bolivian Littoral.

While the Government of Chile was thus appropriating millions from the customs receipts of Arica, which revenues had been specifically appropriated and set apart for the payment of the concessionaries in this case, and which, therefore, belonged *pro tanto* to them, and while that Government was also securing other and much larger sums derived as revenue from the territory of the Littoral seized by her and retained after the War of the Pacific, the concessionaries themselves were, by reason of this unlawful action of the Government of Chile in appropriating the customs receipts of Arica, becoming more and more destitute, some of them being finally reduced almost to penury. The concessionaries state that the original liquidation of the firm was due to the failure of Bolivia to observe its contracts with Gama, who appears to have been the principal debtor of the original Alsop firm. Upon going into liquidation, Wheelwright spent months at La Paz in efforts, finally successful, to arrange for the settlement of the Gama debt, which had been assigned to the firm. Following this arrangement at La Paz, he went immediately into the Littoral, where, overcoming obstacles that might well have daunted the strongest man, he labored unceasingly in an effort to secure possession of the government estacas, from the operation of which he might hope to secure something towards the liquidation of his claim. Before he accomplished his purpose, Chile took military possession of the Littoral, and his difficulties, already all but insuperable, were multiplied many times. For more than six years he lived in the desert wilderness of the Littoral, and sought with indomitable will to secure the rights to which under his contract he was clearly entitled. Meanwhile, his representative at Santiago literally bombarded the Chilean Government with petitions in Wheelwright's behalf; and, that no avenue of redress or relief might be left untried, Wheelwright himself brought in the Chilean courts more than two hundred lawsuits in a vain and futile endeavor to secure the enforcement of his rights. But it was all to no purpose. Bandied from court to court, from executive department to executive department, from the Government of Bolivia to the Government of Chile and back, Wheelwright at last found it necessary to do that which, until all other recourse had been exhausted, he had consistently and conscientiously sought to avoid

in order not to embarrass the Government of Chile, namely, appeal to his own Government for diplomatic protection. This was in 1884, and from that time until the present the Government of the United States has, with the utmost patience, added its endeavors to those of the claimants in a thus far ineffectual effort to secure the liquidation of this claim. While the Government of Chile has been adding to the millions of revenue which it has received from the territory wrested from Bolivia at the end of the war, to which territory and to the customs Bolivia looked for revenues to discharge this obligation, the claimants, as already stated, have year by year become poorer and poorer, until at last some of them at least have found themselves in a condition of almost complete destitution.

In view of these facts and circumstances, and of the principles of law involved, it is submitted that the Government of the United States, for and in behalf of the individual claimants under the contract of December 26, 1876, is entitled to an award for the amounts hereinbefore stated and the Government of Chile is under all moral, equitable and legal obligations to pay the same.

The Government of the United States therefore prays from His Britannic Majesty, acting as *amiable compositeur* in this case, an award in the sum of \$2,803,370.36, United States gold, as of December 1, 1909, together with interest thereon at the rate of six per cent per annum until said award is paid, as well as such extra allowance for legal expenses incurred by the claimants in the prosecution of this claim since 1885 as may seem to His Majesty reasonable and just.





















